92-484

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

KENNETH L. BACHMAN, JR.*
GIOVANNI P. PREZIOSO
MICHAEL R. LAZERWITZ
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

* Counsel of Record for Petitioner United States National Bank of Oregon

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Section 92 of the National Bank Act, 12 U.S.C. § 92, which authorizes national banks in certain circumstances to solicit and sell insurance, remains in force.

2. Should the court of appeals have determined whether Section 92 of the National Bank Act remains in force, where the parties neither presented nor took adverse positions on that issue.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Independent Insurance Agents of Oregon, the National Association of Casualty & Surety Agents, the National Association of Surety and Bond Producers, the National Association of Life Underwriters, the National Association of Professional Insurance Agents, the Oregon Association of Life Underwriters, and the Oregon Professional Insurance Agents, Inc. were plaintiffs in the district court and appellants in the court of appeals. Robert L. Clarke, Comptroller of the Currency, and the Office of the Comptroller of the Currency were defendants in the district court and appellees in the court of appeals. The United States was a defendant in the district court.

The following information is provided under Rule 29.1 of the Rules of this Court: The parent company of petitioner United States National Bank of Oregon is U.S. Bancorp, whose shares are publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United States National Bank of Oregon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a), is reported at 955 F.2d 731. The opinion of the district court (App., *infra*, 40a-66a) is reported at 736 F. Supp. 1162.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. Petitions for rehearing were denied on May 22, 1992. App., *infra*, 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752 (a portion of which was codified at 12 U.S.C. § 92), is reprinted at App., *infra*, 67a-76a. Section 5202 of the Revised Statutes is reprinted at App., *infra*, 77a. Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913), is reprinted at App., *infra*, 77a-80a. Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512, is reprinted at App., *infra*, 80a-81a.

STATEMENT

A. The Statutory and Regulatory Scheme

1. Congress has vested the Comptroller of the Currency with substantial supervisory authority over the formation, supervision, and operation of national banks. The Comptroller exercises such authority principally under the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.* *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[1]

2. The NBA, among other things, defines the powers of national banks. Under Section 92 of the NBA, 12 U.S.C. § 92, which Congress enacted in 1916, a national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of

[1] Congress has delegated to the Comptroller the authority for promulgating rules and regulations under the NBA. *See* 12 U.S.C. § 93a.

> the State in which said bank is located to do business in said State.

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752.[2]

Under a longstanding regulation, the Comptroller has applied the authority set forth in Section 92 to any national bank branch office "located in a community . . . of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100.[3] Under other regulations, the Comptroller has required any national bank wishing to perform such "new activities" through a subsidiary to submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. § 5.34 (d)(1)(i). After receiving the proposal, the Comptroller determines whether the activities would "exceed those legally permissible for a national bank's operating subsidiary." 12 C.F.R. § 5.34(d)(1)(iii); *see* App., *infra*, 43a.

[2] As this Court has pointed out, "[w]hen the statutes were revised in 1913 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code." *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972).

Section 92 appeared in each edition of the United States Code until the 1952 edition. *See* 12 U.S.C. § 92 (1926); 12 U.S.C. § 92 (1928); 12 U.S.C. § 92 (1934); 12 U.S.C. § 92 (1940); 12 U.S.C. § 92 (1946). Section 92 no longer appears in the United States Code Annotated, *see* 12 U.S.C.A. § 92 (West 1989 & Supp. 1992), but it remains in the United States Code Service, *see* 12 U.S.C. § 92 (Law. Co-op. 1978 & Supp. 1992). For clarity, we cite to the statute as it appeared in the United States Code.

[3] The Comptroller first codified the regulation in 1971. *See* 36 Fed. Reg. 17,000, 17,015 (1971). The regulation stemmed from an interpretive ruling issued in 1963. *See* C.A. App. 99-100 ("C.A. App." refers to the joint appendix filed in the court of appeals).

B. The Proceedings in This Case

1. Petitioner United States National Bank of Oregon is a national bank chartered under the NBA, with its principal office in Portland, Oregon. In October 1984, petitioner submitted a "new activities" proposal to the Comptroller's Western District. Invoking the authority set forth in Section 92, petitioner sought to offer, through a subsidiary, "a full range of insurance products" from one of petitioner's branch offices located in the small town of Banks, Oregon. App., *infra*, 44a (internal quotation marks and citation omitted).

In August 1986, the Comptroller approved petitioner's proposal and thus authorized petitioner's subsidiary "to sell insurance to customers residing outside [Banks, Oregon]." App., *infra*, 47a (internal quotation marks and citation omitted). After reviewing the text, legislative record, and purposes of Section 92, the Comptroller concluded that the statute permits petitioner

> at its operating subsidiary in Banks, Oregon, to sell insurance as agent to existing and potential customers regardless of where the insurance customers are located.

C.A. App. 69; *see* App. *infra*, 47a-49a.[4]

2. In November 1986, respondents, various trade associations representing insurance agents and underwriters, filed actions against the Comptroller in the United States District Court for the District of Columbia.[5] Respondents

[4] The Comptroller, however, made clear that petitioner "could not sell insurance for a company to customers located in a state where the insurance company is not authorized to do business." C.A. App. 69; *see* App., *infra*, 49a.

[5] Petitioner intervened as an additional defendant after respondents had filed their complaints. *See* App., *infra*, 41a. The district court later consolidated the substantially similar actions. Respondents also named the United States as a defendant. The district court later granted the Comptroller's unopposed motion to dismiss

challenged the Comptroller's approval of petitioner's proposal arguing, among other things, that Section 92 must be construed as placing a geographical limit on the location of such insurance customers.[6] Respondents therefore contended that the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). App., *infra*, 3a.

On cross-motions for summary judgment, the district court in May 1990 upheld the Comptroller's approval of petitioner's proposal. App., *infra*, 40a-66a. Although respondents raised no claim that Section 92 was not in force, the district court pointed out that Section 92 "no longer appears in the United States Code." App., *infra*, 41a n.2. The court concluded, however, that that fact was immaterial "since Congress, other courts, and the Comptroller have presumed [the statute's] continuing validity." App., *infra*, 41a n.2 (citations omitted).

Turning to the substantive issue, the court applied the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and concluded that Section 92 "is silent with respect to geographic limitations on sale and solicitation." App., *infra*, 56a. Proceeding therefore to the second inquiry under *Chevron*, the court reviewed the Comptroller's construction of and decisions under Section 92 and held that "the Comptroller's interpretation, being rational and con-

summarily the complaints against the United States. *See* App., *infra*, 41a & n.1.

[6] Respondents also raised, but later withdrew, a claim based on the restrictions on "branch banking" set forth in 12 U.S.C. §§ 36, 81. App., *infra*, 49a n.16.

Respondents also raised claims under the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. §§ 1841 *et seq.* The district court denied those claims, *see* App., *infra*, 63a-65a, and the court of appeals had no occasion to review them. Accordingly, those claims are not at issue before this Court.

sistent with the statute, must be upheld." App., *infra*, 63a (internal quotation marks and citations omitted). Accordingly, the court rejected respondents' challenge to the Comptroller's approval of petitioner's proposal. App., *infra*, 65a-66a.

C. The Court of Appeals Decision

In February 1992, a divided panel of the court of appeals reversed. App., *infra*, 1a-29a. Despite the fact that none of the parties had raised such a challenge, the court decided to address the question whether Section 92 remained in force.[7] The court determined that because placement of quotation marks shows that Congress originally enacted Section 92 as part of Section 5202 of the Revised Statutes, and then omitted the language of Section 92 from Section 5202 when the latter provision was amended in 1918,[8] Section 92 "has ceased to exist." App., *infra*, 17a. The court thus held that the Comptroller's "ruling [was] not in accordance with law," without reaching the substantive issue resolved below. App., *infra*, 18a.

[7] In the court of appeals, no party (including respondents) or amicus curiae challenged the validity of Section 92. In their opening brief, respondents pointed out that although Section 92 "appears to have been repealed inadvertently in 1918[,] . . . Congress, the Comptroller, and the federal courts have, however, presumed that the statute remains in effect." Resp. C.A. Br. 5 n.3. In response to the court's *sua sponte* order requesting the parties to address that issue at oral argument on March 1, 1991, respondents' counsel candidly stated at that time that although

> [i]t would quite obviously be to [respondents'] advantage if section 92 were no longer in existence, . . . we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

App., *infra*, 24a. Indeed, in response to the court's second *sua sponte* order issued after oral argument that requested supplemental briefing, respondents expressly adhered to their position of accepting the validity of Section 92. *See* Resp. Supp. C.A. Br. 1-2; *see also* note 9, *infra*.

[8] *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512.

Judge Silberman dissented. App., *infra*, 23a-29a. In his view, "the majority is quite wrong in its perception of our judicial obligation." App., *infra*, 25a. As Judge Silberman explained:

> We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us.

App., *infra*, 25a. He therefore concluded that the court had improperly "created a controversy that did not exist." App., *infra*, 25a. Accordingly, Judge Silberman would

> affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

App., *infra*, 29a.

The court of appeals later denied petitions for rehearing, together with suggestions for rehearing en banc. App., *infra*, 30a-39a.[9]

[9] In submitting its court-ordered response to the petitions for rehearing filed by the Comptroller and petitioner, respondents did an about-face and agreed with the court of appeals that Section 92 no longer remained in force. *See* Resp. C.A. Opp. to Pet. for Rehearing 2, 8-24; *see also* note 7, *supra*.

Judge Silberman dissented from the denial of rehearing. App., *infra*, 30a. Judge Silberman, Williams, and D.H. Ginsburg dissented from the denial of rehearing en banc, and would have limited rehearing to the issue of the court's authority to reach the question whether Section 92 remained in force. App., *infra*, 35a-37a. Judge Sentelle, joined by Judges Buckley and Henderson, filed a separate opinion concurring in the denial of rehearing en banc that took issue with Judge Silberman's dissent. App., *infra*, 33a-34a. Judge Randolph filed a separate statement. App., *infra*, 38a-39a.

REASONS FOR GRANTING THE PETITION

The court of appeals has effectively struck down an Act of Congress. In holding that Section 92 of the National Bank Act no longer remains in force, the court has ignored statutory language and overlooked pertinent aspects of the legislative record. As a result, the court's erroneous interpretation calls into question widespread and substantial national and state bank insurance activities that Section 92 has engendered over the past seventy-five years—activities previously sanctioned by other federal courts, the Congress, the Comptroller, the Board of Governors of the Federal Reserve System, and state banking authorities relying on the federal statutory provision. Such a narrowing of previously sanctioned banking activities and the Comptroller's authority in this regulatory arena calls for this Court's review.

Moreover, the court of appeals' misguided statutory analysis led it to invalidate Section 92, where other federal courts—including this Court in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972)—correctly considered that provision to have remained in force. Indeed, the courts of appeals are currently in conflict over that issue. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), the Second Circuit flatly disagreed with the decision below and held that Section 92 remains in force. *See* 968 F.2d at 151-54. Further review by this Court is necessary to resolve this conflict among the courts of appeals over the continuing existence of Section 92.

Finally, the court of appeals here reached out to nullify Section 92 by creating a controversy of its own making. Such a practice—where the parties neither presented nor took adverse positions on the issue resolved by the court—cannot readily be squared with the role that Article III of the United States Constitution assigns to the judiciary. Given the court of appeals' invalidation of this significant and established provision of the National Bank Act, under

circumstances of the court's own making, further review by this Court is warranted.[10]

1. Since its enactment in 1916, the validity of Section 92 has been uniformly accepted by this Court, other federal courts the Congress, the Comptroller, and the Federal Reserve Board.[11] Indeed, in 1982, Congress amended an aspect of Section 92 unrelated to the insurance provision, *see* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11, and in 1987 imposed a one-year moratorium on the expansion of insurance activities under Section 92, *see*

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[10] The court of appeals' *sua sponte* determination of the validity of Section 92 is no impediment to this Court's review of the issue. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991).

[11] *See, e.g., Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. at 401 & n.12; *Independent Ins. Agents of America, Inc. v. Board of Governors of the Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 & n.6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *Genessee Trustee Corp. v. Smith*, 102 F.2d 125, 127 (6th Cir. 1939); *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Assocs., Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980); *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 1st Sess., pt. 1, at 280-81 (1957); *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess., pt. 2, at 991, 1028, 1036, 1067, 1068, 1104, 1507-08 (1958); S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks"); *Annual Report of the Comptroller of the Currency* 925 (1916); *Third Annual Report of the Federal Reserve Board* 135-36 (1917).

Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[12]

This settled state of affairs has given rise to widespread and substantial national and state bank insurance activities across the country. The Office of the Comptroller of the Currency recently has estimated that at least 179 national banks are engaged in insurance operations under the aegis of Section 92. In addition, the Comptroller has estimated that at least 115 state-chartered banks sell insurance under state parity laws that permit such banks to engage in the same activities as national banks.[13] The decision below, however, creates considerable uncertainty over the propriety of these ongoing insurance operations, and curtails the Comptroller's authority in this regulatory arena. As such, the court of appeals' decision threatens to interfere with the orderly administration of an important aspect of our nation's banking operations.

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[12] In 1991, Congress considered—but did not enact—legislation that would have substantially amended Section 92 and curtailed national banks' insurance activities. *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

[13] *See* Declaration of Rosa M. Koppel, Esq., Office of the Comptroller of the Currency ¶¶ 6, 7 (Apr. 14, 1992), *The Owensboro Nat'l Bank v. Wright*, No. 91-3 (E.D. Ky.); *see, e.g.*, Ariz. Rev. Stat. Ann. § 6-184.2; Ill. Rev. Stat. ch. 17, para. 311(11); Md. Fin. Inst. Code Ann. § 5-504; N.D. Cent. Code § 6-03-38; Utah Code Ann. § 7-3-10(1).

The fact that the number of banks engaged in insurance activities comprises a relatively small percentage of the total number of national and state banks does not diminish the significance of these activities. The insurance activities at stake—as evidence by the vigorous opposition of insurance industry trade associations in this case and others—are substantial.

2. The court of appeals declared that Section 92 no longer exists—despite the settled state of affairs engendered by that provision over the past seventy-five years—by focusing on punctuation contained in the original enrolled bill. More specifically, the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753. *See* App., *infra*, 7a-8a, 67a-72a. In the court's view, that punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. In concluding that Congress repealed Section 92 in 1918, the court of appeals ignored statutory language and overlooked pertinent aspects of the legislative record. All the available evidence—most tellingly the statutory language itself—shows that Congress enacted Section 92 as part of the Federal Reserve Act of 1913 and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

a. This Court has recently reiterated the "cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citation omitted); *see, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). In other words, "'[i]n ascertaining the plain meaning of [a] statute the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *see United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section

13 of the Federal Reserve Act of 1913,[14] not Section 5202 of the Revised Statutes.[15] The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* App., *infra*, 69a-70a. The fact that the second and third paragraphs of Section 13 of the Federal Reserve Act grant the banks such discount and rediscount authority further confirms that "this Act" refers to the Federal Reserve Act. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; App., *infra*, 68a-69a.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act" This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. See App., *infra*, 70a. Moreover, the 1916 enactment's addition of a paragraph entitled "Fifth" to the existing four paragraphs of Section 5202 supports this common sense construction of the statute. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; App., *infra*, 70a.

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[14] *See* Pub. L. No. 63-43, § 13, 38 Stat. 263-64 (1913); App., *infra*, 77a-80a.

[15] Section 5202 of the Revised Statutes, originally enacted as part of the National Banking Act, *see* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677; Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110, dealt exclusively with limits on the indebtedness of national banks. *See* App., *infra*, 77a.

In other words, the "language of the statute itself" [16] shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.[17] Accordingly, Congress's amending Section 5202 in 1918 without mentioning the language of Section 92 did not effect a repeal of the latter; Congress had no intention of placing Section 92 within Section 5202 in the first instance.[18]

b. This straightforward construction of the statute, as described above, reveals the court of appeals' error in placing undue weight on the placement of punctuation. This Court has instructed lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83

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[16] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

[17] If, however, Congress had sought to incorporate Section 5202 into the Federal Reserve Act, it presumably would have referred to "this Act" as opposed to referring explicitly to "the Federal reserve Act."

[18] The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; App., *infra*, 67a, further shows that Congress placed Section 92 within Section 13 of the Federal Reserve Act, not within Section 5202 of the Revised Statutes. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202, but the 1916 Act did not change that 1913 amendment. *See* 38 Stat. 264; 39 Stat. 752-53; App., *infra*, 70a, 79a-80a. In other words, Congress was not amending Section 5202 in 1916, and the title of the 1916 enactment describes precisely what Congress sought to accomplish. *Compare Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 528 (1947) ("That the heading of [a statute] fails to refer to all the matters which the framers of that [statute] wrote into text is not an unusual fact.").

(1932); *see Crawford v. Burke*, 195 U.S. 176, 192 (1904) ("So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole."); *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("[p]unctuation is a most fallible standard by which to interpret a writing"); *cf. Taylor v. United States*, 495 U.S. 575, 581-99 (1990) (Congress intended to retain the statutory definition of "burglary" despite repealing the pertinent definitional provision). The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after paragraph 6 as part of Section 5202, *see* App., *infra*, 70a-73a—should not serve to effect an unintended repeal. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As this Court has long made plain, "[t]he cardinal rule is that repeals by implication are not favored." *Posados v. National City Bank*, 296 U.S. 497, 503 (1936).

Moreover, the available legislative record confirms what is apparent from the face of the 1916 enactment—that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. The bill that became the 1916 enactment, H.R. 13391, as passed by the Senate in July 1916, contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act, which included Section 92. *See* H.R. 13391, as amended by the Senate, 64th Cong., 1st Sess. § 13 (1916). Indeed, the Senate had adopted a specific amendment to delete quotation marks from the bill. *See* 53 Cong. Rec. 11,155 (1916). It was thus clear that the reference to Section 5202 of the Revised Statutes concluded with the paragraph identified as "Fifth," thus placing Section 92 squarely within the Federal Reserve Act.

The bill then proceeded to the Conference Committee. The Committee's final working version of the section amending Section 13 of the Federal Reserve Act was

printed without quotation marks in section 13. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916). The Committee's final marked-up version, however, was changed. This version, to which the House agreed in late August 1916, contained handwritten quotation marks only at the beginning of each paragraph; the version to which the Senate agreed, however, did not contain quotation marks.[19] The House marked-up version, which was apparently slated to be printed as the final bill, and the Senate version, again each ensured that Section 92 would be placed within the Federal Reserve Act, not within Section 5202 of the Revised Statutes.

It was only in the versions reprinted in House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent quotation marks appeared, thus sowing the confusion that led the court of appeals astray.[20] This clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. *See Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917) ("The presence or absence of a comma, according to the whim of the printer or proof

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[19] *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House mark-up); H.R. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175); S. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175).

The Senate's marked-up version of the Conference Committee report, H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Senate mark-up), and the Senate's printed final version of that report, *see* S. Doc. No. 533, 64th Cong., 1st Sess. (1916), each contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act. The House of Representative's printed final version of the Conference Committee report also contained no such punctuation. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House final printed version).

[20] *See Journal of the House of Representatives* 994-95 (1916); 53 Cong. Rec. 13,258-59, 13,354-55 (1916).

reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory construction.").[21]

c. Indeed, the court of appeals' emphasis on the placement of punctuation led it to ignore "concrete evidence . . . that the 65th Congress [did not understand] section 92 to be part of section 5202." App., *infra*, 11a-12a; *see Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2482 n.4 (1991). Both the Comptroller and the Federal Reserve Board, in compilations of pertinent banking statutes submitted to Congress in 1917, each set forth Section 92 as part of the Federal Reserve Act.[22] The year before, the Comptroller in its Annual Report had also expressed the same view. *See Annual Report of the Comptroller of the Currency* 925 (1916). These materials thus help to explain Congress's omitting any reference to the language of Section 92 when it amended Section 5202 in 1918. *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512 (permitting national banks to incur liabilities under the 1918 Act without regard to the debt limits set by Section 5202).[23]

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[21] The pertinent statutory language and legislative record thus effectively rebut whatever presumption may arise from the omission of Section 92 from the more recent versions of the United States Code. *See* 1 U.S.C. §§ 112, 204(a); *United States v. Bergh*, 352 U.S. 40, 47 (1956).

[22] *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks") (Perhaps as a matter of caution, the Comptroller also set forth Section 92 as part of the Revised Statutes.); *Third Annual Report of the Federal Reserve Board* 135-36 (1917). Accordingly, the court below erred in assuming that "there were only three sources to which [the 65th Congress] could turn for up-to-date information: the Statutes at Large, . . . or either of two privately published services." App., *infra*, 11a.

[23] It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act. *See* H.R. Rep. No. 448, 65th Cong., 2d Sess. (1918); 56 Cong. Rec. 2777-805, 2847-61, 2913-27, 3039-53, 3081-109, 3130-51, 3293-96, 3605-32, 3659-87, 3779-812, 3843-45, 4373-79, 4452-63 (1918).

As the Second Circuit has determined, there is no reason to infer that Congress, by enacting the War Finance Corporation Act of 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *See American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992).

Any reference would have been beside the point: according to Congress's contemporaneous understanding, Section 92 remained as part of the Federal Reserve Act, as amended in 1916 by the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753.

3. The court of appeals' truncated statutory analysis led it to invalidate Section 92, where other federal courts —including this Court in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972)— correctly considered that provision to have remained in force. *See* note 12, *supra*. For example, the Fifth Circuit, after noting the United States Code's omission of Section 92 in 1952, as well as the various federal decisions such as *First Security Bank* that address the issue, expressly concluded that "further discussion of the issue [concerning Section 92's validity] seems moot." *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1262 n.6 (5th Cir. 1980); *see Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968).

More significantly, the decision below conflicts squarely with a recent decision of the Second Circuit. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), the Second Circuit—in response to the issuance of the decision below—*sua sponte* addressed the issue of the validity of Section 92 and expressly held that Section 92 remains in force. *See* 968 F.2d at 151-54. After reviewing the language, purposes, and legislative history of the War Finance Corporation Act of 1918, the Second Circuit concluded that "Congress did not intend to alter the insurance agency powers of national banks [previously

enacted in Section 92]." 968 F.2d at 154.[24] Accordingly, the court held that the 1918 Act did "not effect a repeal of 12 U.S.C. § 92." 968 F.2d at 154.[25]

4. Finally, the court of appeals should not have even had the opportunity to err. As another court has succinctly stated:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (quoted in App., *infra*, 25a-26a (Silberman, J., dissenting)). Moreover, this Court has long made clear that Congress has not conferred—and may not confer—"jurisdiction on Art. III federal courts to render advisory opinions, . . . because suits of this character are inconsistent with the judicial function under Art. III." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted); *see, e.g., Muskrat v. United States*, 219 U.S. 346 (1911). As this Court has instructed, a prohibited advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision

[24] In *American Land Title Ass'n v. Clarke*, the Second Circuit apparently assumed—without further analysis—that Congress enacted Section 92 as part of Section 5202 of the Revised Statutes, not as part of Section 13 of the Federal Reserve Act. *See* 968 F.2d at 151-52. As we have explained, that assumption is erroneous.

More recently, in *The Owensboro Nat'l Bank v. Wright*, No. 91-3 (E.D. Ky. Aug. 4, 1992), the district court adopted the Second Circuit's rationale and thus held that "section 92 remains valid law." Slip op. 16 (internal quotation marks and citation omitted).

[25] The Second Circuit proceeded to the substantive question presented and concluded, contrary to the Comptroller's construction and application of the statute, that "section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business." *American Land Title Ass'n v. Clarke*, 968 F.2d at 157.

advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933) (citations omitted).

Here, it is plain that the court of appeals reached out to nullify Section 92 by creating a controversy of its own making. *See* note 7, *supra*. Despite the court's repeated invitation, no party contended that Congress had repealed Section 92 in 1918. As this Court has cautioned, federal courts should not strive to resolve issues that the parties have not properly presented where, as here, the issue concerns the validity of an Act of Congress. *See Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (district court exceeded its jurisdiction by invalidating federal statute where parties had not challenged it). Indeed, that prohibition applies with particular force in this case, because federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (*per curiam*).

This case does not involve circumstances that would warrant a departure from these settled principles. Proper resolution of the Section 92 issue is not beyond any doubt. *See, e.g., Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (*per curiam*). As the court of appeals itself acknowledged, the statutory analysis confirming Section 92's validity is "plausible." App. *infra*, 17a. Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified by—the reported case law.[26] Nor is this a case

[26] *See also United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. . . . Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment

where "injustice might otherwise result" if the Section 92 issue had not been determined. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). And there is no suggestion that this case involves the sort of collusive "stipulation[] as to matters of law" that courts may disregard. *See* App., *infra*, 33a (Sentelle, J., concurring in the denial of rehearing *en banc*); *cf. Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

The consequences of the court of appeals' casting aside these jurisdictional principles are substantial. As Judge Silberman stated:

> Injustice is more likely to result from our reaching the issue [of the validity of Section 92] than from our declining to do so, because [that] question . . . affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence and who, having no notice that the question might be decided, had no opportunity to make their views known in this case.

App., *infra*, 29a (dissenting opinion); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (declining to resolve issue where party "has never been heard in any way on the merits").

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will reinforce error already prevalent in the system.") (citation omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH L. BACHMAN, JR.*
GIOVANNI P. PREZIOSO
MICHAEL R. LAZERWITZ
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
* Counsel of Record for
Petitioner United States
National Bank of Oregon

SEPTEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 1, 1991 Decided February 7, 1992
As Amended February 25, 1992

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

No. 90-5214

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Appellants

v.

ROBERT L. CLARKE, *et al.*

Appeals from the United States District Court
for the District of Columbia Circuit

(D.C. Civ. Nos. 86-3042 & 86-3045)

Before SILBERMAN, BUCKLEY, and HENDERSON, *Circuit Judges*.

BUCKLEY, Circuit Judge:

Appellants challenge a ruling by the Comptroller of the Currency that would permit any national bank, or its branch, located in a community of not more than five thousand inhabitants to sell insurance to customers outside that community. The Comptroller based his ruling on section 92 of the National Bank Act. As we find *sua sponte* that that section has been repealed, and as the Comptroller cites no alternative authority for his ruling, we reverse.

I. Background

Section 92 was enacted in 1916 as an amendment to section 5202 of the Revised Statutes of the United States. It provided, in relevant part, that any national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any . . . insurance company authorized by the authorities of the State in which said bank is located to do business in said State.

39 Stat. 750, 753 (1916). This provision was codified as section 92 of Title 12 of the United States Code. Although section 92 was omitted from section 5202 when the latter was revised and reenacted in 1918, and although the section has been omitted from recent editions of the United States Code, the Comptroller has continued to treat it as valid. *See, e.g.*, 12 C.F.R. § 7.7100 (1991).

The appellant trade associations, which represent insurance agents and underwriters, challenge a ruling by the Comptroller that is based on section 92. The ruling holds that under that statute, "a national bank or its

branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere." Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to Mr. T. Dalrymple (Aug. 18, 1986), *reprinted in* Joint Appendix at 65. Appellants assert that section 92 places a geographical limit on such sales; and they brought this action to have the ruling set aside under the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1988), as a national bank is not permitted to engage in any activity that is not specifically authorized by law. *See* 12 U.S.C. § 24 (1988).

The district court granted the Comptroller's motion for summary judgment based on its finding that his interpretation of section 92 was "rational and consistent with the statute." *National Ass'n of Life Underwriters v. Clarke*, 736 F.Supp. 1162, 1173 (D.D.C.1990) (internal quotation marks omitted). Although the court noted "that [section 92] no longer appears in the United States Code," it stated that it would "assume that the statute exists *in propria vigore*" because "Congress, other courts, and the Comptroller have presumed its continuing validity." *Id.* at 1163 n. 2 (citations omitted). The court cited no other source of authority for the Comptroller's ruling; nor does the Comptroller claim any.

After the parties had submitted their appellate briefs, we asked them to address two questions: First, should this court decide the validity of section 92 in the absence of a challenge to that validity by any of the parties? Second, was section 92 in fact valid? In response to the first question, appellants took the position that this court was required to consider the validity of section 92 as it "would be without constitutional authority or power to render [a decision on the merits] if Section 92 [did] not exist." Supplemental Biref for Appellants at 3. The Comptroller, on the other hand, argued that it would be

inappropriate for the court to address the issue: It had not been raised by the parties; and, in any event, "the legal issue identified by the Court [did] not go to its jurisdiction, but rather to the merits of plaintiffs' claims." Supplemental Brief for Federal Appellees at 5.

In responding to our second question, the parties agreed that section 92 remains in effect. They argue that Congress did not intend to repeal section 92. Its technical deletion, they claim, was the result of misplaced quotation marks and therefore should be ignored; moreover, as section 92 was unrelated to the purposes of the 1918 revision of section 5202, an intention to repeal it should not be imputed to Congress. Finally, the parties claim that subsequent action by Congress, the Comptroller, and the federal courts (including the Supreme Court) confirms that section 92 remains in effect.

For the reasons set forth below, we conclude that we must decide whether section 92 continues to have the force of law; and because we find it does not, we reverse.

II. Discussion

A. Should the court decide section 92's validity?

The role of the judicial branch is a limited one.

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.). On occasion, however, a court will find it necessary to go beyond the specific legal theories advanced by the parties. In *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990), for example, the parties agreed that the case

depended on the proper application of section 318 of the Federal Power Act. The Supreme Court concluded, however, that the challenged orders did not fall within the scope of that section, and it disposed of the case on another basis. *Id.* at 111 S.Ct. at 418. *See also Kamen v. Kemper Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) ("court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). Moreover, federal courts "are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939); *see also Sebold v. Sebold*, 444 F.2d 864, 870 n. 8 (D.C.Cir. 1971) ("Since this is a question of law, . . . the agreement of counsel is not binding on this court."). The Supreme Court has also held that a court must take judicial notice of a state law that is invalid, stating that "on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." *Town of South Ottawa v. Perkins*, 94 U.S. 260, 268, 24 L.Ed. 154 (1876).

We believe that this is one of those occasions where a court may properly dispose of a case on a basis not advanced by the parties. Here, the legal question we are asked to decide is the geographical reach of section 92. We are on notice, however, that the section no longer appears in the United States Code. That fact gives rise to a statutory presumption that the law invoked by the parties is invalid, *see* 1 U.S.C. § 204(a) (1988), a presumption that the parties have been given ample opportunity to rebut. Because this controversy hangs on the interpretation of a statute that is presumed not to exist, we not only have the right to inquire into its validity, we have the duty to do so.

B. Is section 92 valid?

Section 204(a) of Title 1 of the United States Code states:

> The matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States, general and permanent in their nature.

Therefore, in order to determine whether section 92 is valid, we first consult the Code. On inspecting 12 U.S.C. § 92 (1988), we find the following:

> **§ 92. Omitted**
>
> Codification
>
> The provisions of this section, which authorized national banking associations in any place where the population did not exceed 5,000 to act as an insurance agent or real estate broker, were added to R.S. § 5202 by act Sept. 7, 1916, were omitted in the amendment of R.S. § 5202 by act Apr. 5, 1918, and therefore this section was omitted from the Code. Pub.L. 97-320, Oct. 15, 1982, purported to amend the Act of September 7, 1916 by deleting [two provisions]. R.S. § 5202, as amended, was set out as section 82 of this title prior to repeal by Pub.L. 97-320.

12 U.S.C. § 92 (1988) (citations omitted). In sum, the codifiers treat section 92 as having been repealed in 1918.

Because we must look to the Code for *prima facie* evidence of federal law, its omission creates a presumption that section 92 does not exist. Still, other evidence may rebut that presumption; " 'the very meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.' " *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082,

1085 n. 4, 12 L.Ed.2d 152 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426, 63 S.Ct. 1135, 1136, 87 L.Ed. 1490 (1943) (per curiam)). We must therefore examine the text of the Statutes at Large to see whether they rebut the presumption that section 92 has been repealed.

1. *The Statutes at Large*

The critical statutes are section 13 of the Federal Reserve Act of 1913, Pub.L. No. 63-43, § 13, 38 Stat. 251, 263-64 (1913) ("1913 Act"), the 1916 amendments to that Act, Pub.L. No. 64-270, 9 Stat. 752, 753 (1916) ("1916 amendments"), and section 20 of the War Finance Corporation Act of 1918, Pub.L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) ("1918 Act"). The relevant provisions of these statutes will be found in appendices, A, B, and C to this opinion.

As will be seen in Appendix A, section 5202 of the Revised Statutes of the United States, as amended by the 1913 Act, is to be found in the text of section 13 of that Act. The question raised by the parties is whether Congress, in 1916, intended to make the new section 92 a part of section 5202. The critical language in the 1916 amendments reads as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding. . . .
>
> * * * *
>
> "That in addition to the powers now vested by law in national banking associations . . . located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance

company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company. . . . *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it. . . . *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

The middle paragraph above would later be codified as 12 U.S.C. § 92. Thus, on its face, the 1916 amendments had the effect of placing section 92 within section 5202 of the Revised Statutes.

Two years later, Congress enacted the 1918 Act. Section 20 of that Act reads in part as follows:

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time . . . except on account of demands of the nature following:

"First. Notes of circulation.

* * * *

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

Section 20, in short, sets forth between opening and closing quotation marks what appears as the entire text of the revised section 5202; and as a glance at Appendix C will confirm, the language of section 92 is not to be found in section 5202 as amended.

Under traditional rules of statutory construction, the meaning of section 92's omission is plain; material

omitted on reenactment is deemed repealed. *See, e.g., Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373, 25 S.Ct. 443, 449, 49 L.Ed. 790 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to reenact it."); 1A N. Singer, Sutherland Statutory Construction § 23.12, at 355 (4th rev. ed. 1985) ("When the amendatory act purports to set out the original act or section as amended . . . all matter that is omitted in the act or section which the amendment purports to set out as amended, is considered repealed.") (footnotes omitted). Thus the language and punctuation of the Statutes at Large, traditionally construed, support the codifier's conclusion that section 92 was repealed by the 1918 Act.

2. *Did Congress Intend to Repeal Section 92?*

The parties do not dispute the fact that section 92 cannot survive a literal reading of the 1916 and 1918 statutes. They argue, instead, that the section remains valid because Congress did not intend to repeal it. They make their statutory argument in two stages: First, they contend that the apparent deletion was the result of misplaced quotation marks in the 1916 amendments that had the effect of placing section 92 within section 5202 of the Revised Statutes instead of making it part of section 13 of the Federal Reserve Act. They then reason that as section 5202 as amended was not intended to include section 92, its omission from the subsequent revision of section 5202 should not effect a repeal.

They assert, specifically, that a quotation mark should not have appeared at the end of the paragraph marked [1] in Appendix B, and that the quotation mark now appearing after the first colon in paragraph [2] should have been placed at the beginning of that paragraph. Had section 20 been so punctuated, they say, it would be clear that section 5202 itself had not been amended to

include the textually unrelated paragraphs marked [3], [4] (section 92), and [5]. Because a change of these quotation marks would make for greater textual consistency in the 1916 amendments, the parties argue that a mistake was made in the printing of the bill, and they cite cases in which courts have adjusted the punctuation of statutes in order to make sense of them. They conclude that the 1918 Act's revision of section 5202 did not delete section 92 because the latter could not properly be considered part of the former.

In support of their view of the 1916 amendments and their interaction with the 1918 Act, the parties direct our attention to a letter and memoranda submitted to the House Banking Committee in 1958 that also conclude that the inclusion of section 92 in section 5202 of the Revised Statutes was inadvertent, and that section 92 was therefore never repealed. *See Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the Comm. on Banking and Currency of the House of Representatives*, 85th Cong., 2d Sess. 1035, 1036 (1958) ("1958 Hearings") (letter from Comptroller asserting that Congress misplaced quotation marks and that section 92 "remain[s] in full force"); *id.* at 1036-40 (memorandum from Federal Reserve Board reaching same conclusion); *id.* at 1063-65 (Library of Congress's Legislative Reference Service reaching same conclusion); *id.* at 1065-71 (general counsel of Banking Committee reaching same conclusion).

This is an impressive array of witnesses, but the verdict is not unanimous. Committee member (and future chairman) Wright Patman was of the view that section 92 did not exist. *Id.* at 1062 (section 92 "was repealed in 1918"). Seven years later, the staff of a House Banking subcommittee, after examining the response of the Comptroller to a series of questions, would conclude that

> [w]hether or not the Congress . . . [intended] to perpetuate 12 U.S.C. 92, cannot be ascertained. In any event, however, its intentions would not suffice to overcome the effect of the deletion of § 92 by the inclusion of § 20 in the Act of 1918. . . . Section 92 is non-existent.

Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance, 89th Cong., 1st Sess. 3, 391 (1965) ("1965 Hearings").

It seems to us that the subcommittee staff had its eyes on the right question; namely, on the effect of the 1918 Act. Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand. What we are called upon to determine are the consequences of the action taken by the 65th Congress when, two years later, it voted the 1918 Act into law. Section 20 of that Act, which amended section 5202, originated as a floor amendment that was adopted without debate. *See* 1965 Hearings at 391. It seems fair to assume that in drafting section 20 and in voting to enact it, the author and interested members of the House and Senate would have sought out a current text of section 5202 to work from, and not relied on institutional memories of what the text was, or should have been.

At that time, there were only three sources to which they could turn for up-to-date information: the Statutes at Large, which reproduced section 5202's facially unambiguous language, or either of two privately published services. Each of these services reported that as a result of the 1916 amendmnets, section 5202 of the Revised Statutes contained the provisions to be found in the paragraphs marked [2] though [5] of Appendix B. *See* 9 U.S.Comp.Stat.Ann. § 9764 (West 1916) and 3 U.S.Stat.Ann. § 5202 (T.H. Flood & Co. 1916). Absent concrete evidence to the contrary, we must assume that the 65th Congress understood section 92 to be part of

section 5202, and that its exclusion from the amended section 5202 signaled its repeal.

The Comptroller argues, however, that as the purpose of the War Finance Corporation Act of 1918 was to assist the financing of the war effort, a purpose that had no logical relationship to the insurance activities of small town banks, the traditional rule governing provisions omitted in the version of a statute should not be applied to this case. In support of this position, the Comptroller cites two cases interpreting the Clayton Finality Act of 1959, 73 Stat. 243 (1959), *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 87 S.Ct. 998, 18 L.Ed.2d 11 (1967), and *F.T.C. v. Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir. 1967), which conclude that "the rule that amendment 'to read as follows' repeals everything omitted . . . must yield where [its] application would be inconsistent with the purposes of the statute." *Standard Motor*, 371 F.2d at 617.

The inconsistency found in those two cases was one where the literal application of a statutory phrase in the Clayton Finality Act would have frustrated a clearly stated purpose of the amendment. Here, however, there is no inherent contradiction between the deletion of section 92 and facilitating the financing of the American war effort. The two are simply unrelated, and no one argues that the stated purpose of the 1918 Act would have been impeded by the section's repeal.

The Comptroller refers us to cases indicating that we have the authority to rectify Congress's apparent error: When "a mistake in draftsmanship is obvious, courts may remedy the mistake," *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C.Cir.1981); in construing a statute, a court "will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83, 53 S.Ct. 42, 43-44, 77 L.Ed.

175 (1932). *See also Hammock v. Loan and Trust Co.*, 105 U.S. 77, 84-85, 26 L.Ed. 1111 (1881) (same). In each of these cases, the error distorted the meaning of a statute; where the putative error brings about the repeal of a statute, however, judicial correction entails a far graver task—a task that has generally been shouldered by the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37, 60 S.Ct. 635, 637-38, 84 L.Ed. 909 (1940) (New York legislature altered trust law and inadvertently immunized certain trusts from taxation; gap corrected by statute); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir.1982) (Congress inadvertently repealed statute prohibiting possession of drugs aboard American ships at sea; gap corrected by statute).

3. *Subsequent treatment by Congress, the Comptroller, and the courts*

The parties argue, finally, that the subsequent treatment of section 92 by legislative, administrative, and judicial officials requires us to find that the provision is alive and well. First, they note that Congress in 1982 attempted to delete several provisions from section 92. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub.L. No. 97-320, § 403(b), 96 Stat. 1469, 1510-11 (1982); *see also* S.Rep. No. 536, 97th Cong., 2d Sess. 60 (1982), *reprinted in* 1982 U.S.Code Cong. & Admin. News 3054, 3114 (section 403(b) is "a conforming amendment to 12 U.S.C. § 92, which deletes *existing* reference to the authority of national banks.") (emphasis added). Moreover, at the time the parties filed their supplemental briefs, Congress was considering legislation that, *inter alia*, would repeal section 92. *See* H.R. 6, 102nd Cong., 1st Sess. § 432 (1991). The parties contend that Congress would hardly seek to modify or repeal a statute that no longer existed.

What Congress may now believe, however, is irrelevant. "[I]t is well settled that the views of a subsequent Con-

gress form a hazardous basis for inferring the intent of an earlier one." *Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted). Section 92 was either repealed in 1918 or it was not; and for those same reasons, it is also immaterial that the Comptroller of the Currency has continued to treat the section as valid. Federal agencies have no authority to reinstate a statute that Congress has repealed.

In one of the cases cited by the parties has a court found that section 92 remains valid; rather, they have presumed that it does. *See, e.g., Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn. 18-20 (D.C.Cir.1979); *Independent Ins. Agents of America, Inc. v. Board of Governors of Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261 n. 6 (5th Cir. 1980).

While the Supreme Court made a number of references to section 92 in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1972), its decision did not depend on the statute's continued vitality. That case concerned section 482 of the Internal Revenue Act ("IRA"), which, for tax purposes, allows the Commissioner to reallocate income among companies that are under common ownership or control. *See* 26 U.S.C. § 482 (1988). Two national banks, presumably located in communities having in excess of five thousand inhabitants, referred borrowers electing to purchase credit life insurance to an independent insurance company that, in turn, would reinsure the policies with an insurance subsidiary of the holding company that owned the banks. The banks generating the credit life insurance received no compensation for their services; in fact, they had been advised by counsel that it would be unlawul for them to received any income as a result of their customers' purchase of the insurance. 405 U.S. at 397, 92 S.Ct. at 1088. Nevertheless, the Commissioner of Internal Revenue used his authority under section 482 of the IRA to reallocate forty percent of the insurance subsidiary's premium income to the banks as compensation for originating the credit.

The Supreme Court described the question before it as "whether there was a shifting or distorting of the Banks' true net income resulting from the receipt and retention by [insurance subsidiary] of the premiums above described." *Id.* at 400-01, 92 S.Ct. at 1089-90. The Court noted that

> the Banks could never have received a share of these premiums. National banks are authorized to act as insurance agents when located in places having a population not exceeding 5,000 inhabitants, 12 U.S.C.A. § 92.12 [12]

[12] Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provisions in his Regulations, 12 CFR §§ 2.1-2.5 (1971).

Id. at 400 and n. 12, 92 S.Ct. at 1090 & n. 12. The Court then observed:

> Although § 92 does not explicitly prohibit banks in places with a population of over 5,000 from acting as insurance agents, courts have held that it does so by implication.
>
> The Comptroller of the Currency has acquiesced in this holding, and the Court of Appeals for the Tenth Circuit expressed its agreement in the opinion below.
>
> • • • •
>
> [The Commissioner] does not contest this finding by the Tax Court or the holding in this respect of the Court of Appeals below. *Accordingly, we assume*

for purposes of this decision that the Banks were prohibited from receiving insurance-related income.

. . .

Id. at 401-02, 92 S.Ct. at 1090-91 (emphasis added) (footnote omitted).

Based on this assumption, the Court concluded that because the banks did not in fact receive any premium income, and because they would have been precluded from receiving such income whether or not they were under common control with the insurance subsidiary, "the premium income received by [the insurance subsidiary] could not be attributable to the Banks"; the "Commissioner's exercise of his § 482 authority was therefore unwarranted." *Id.* at 407, 92 S.Ct. at 1093.

While it is true, as Justice Blackmun noted in dissent, that the Court had placed "repetitive emphasis on the missing § 92," *id.* at 419, 92 S.Ct. at 1099, its reliance was based on an explicit assumption that the statute prohibited insurance sales by a national bank located in a community with a population of more than five thousand. This assumption as to the application, we believe, extended to the validity of the section. Although the Court had earlier referred to section 92 as authorizing national banks to act as insurance agents in places having no more than five thousand inhabitants, *id.* at 401, 92 S.Ct. at 1090, that reference was qualified by footnote 12, which called attention to section 92's omission from recent editions of the United States Code.

Thus, the Supreme Court never directly addressed the question before us today. A determination of the validity of section 92 was not necessary to its decision in *First Security Bank*; and while the footnote observed that the Comptroller still considered the section to be effective, this does not indicate that the Court adopted such a view.

III. Conclusion

We acknowledge that the parties' analysis of the 1916 amendments is plausible, and that the placement of section 92 in section 5202 of the Revised Statutes might well have been a mistake. Their claim that we must therefore find section 92 valid, however, runs up against the stubborn fact that the troublesome quotation marks are located where they are, not where the parties argue that the 64th Congress intended them to be. Like it or not, they are an integral part of the bill that the President signed into law and that was enrolled in the Statutes at Large. In adopting section 20 of the 1918 Act, the 65th Congress amended section 5202 as it appeared in those Statutes; and as the parties have failed to point to any any concrete evidence to the contrary, we must conclude that Congress intended the consequences of its actions, and that section 92 has ceased to exist.

Moreover, even if we were persuaded that its repeal was in fact the result of cumulative mistakes by both Congresses (the misplacement of quotation marks in 1916 and the failure to take corrective action in 1918), we would still be hesitant to move into the breach. We recognize that, in order to give effect to a clear congressional intent, federal courts have assumed a rather broad responsibility for correcting flaws in the language and punctuation of federal statutes. There is a point, however, beyond which a court cannot go without trespassing on the exclusive prerogatives of the legislative branch.

We believe we are at that point. It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

As section 24 of the National Bank Act limits a national bank's activities to those authorized by law, and as the Comptroller cites no authority other than that section for its challenged ruling, we find that ruling not in accordance with law. We therefore reverse and remand the case to the district court with instructions to enter judgment for appellants.

So ordered.

APPENDIX A

POWERS OF FEDERAL RESERVE BANKS

Section 13 of Federal Reserve Act of 1913

Sec. 13. Any Federal reverse bank may receive. . . .

• • • •

Any member banks may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the Unitel States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

APPENDIX B

1916 Amendments to Federal Reserve Act of 1913

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal Reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * * *

That section thirteen be, and is hereby amended to read as follows:

* * * *

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a
[1] period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so
[2] as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Money deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receiv-
[3] able and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the
[4] laws of the United States any such
[§ 92] association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . *Povided* [sic], *however*, That no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it . . . *Provided further*, That
[5] no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

APPENDIX C

Section 20 of the War Finance Corporation Act of 1918

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I.—WAR FINANCE CORPORATION

* * * *

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

SILBERMAN, Circuit Judge, dissenting:

My position might be thought counter-intuitive, but I would decide the case, as did the district court, without reaching the question the majority thinks is a necessary

antecedent: whether section 92 is still good law. Appellants did not challenge the validity of section 92. Indeed, after the court ordered the parties to address the issue at oral argument and appellees filed supplemental materials supporting the conclusion that the statute was not repealed, counsel for appellants forthrightly said:

> It would quite obviously be to the appellants' advantage if section 92 were no longer in existence, since there would be no statutory basis for the Comptroller's order. We have researched the issue, both earlier and in light of the court's questions, and we have carefully reviewed the submission made by the government. . . . Given that the statutory issue involves a controversy over the use of punctuation, that Congress obviously intended to amend the law in 1982, and that the Supreme Court has in fact described the law as in effect, while noting its curious history, we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

To be sure, when five months later the panel, having not decided the case, directed the parties to brief the issue, appellants—no doubt at that point realizing that their chances for success were dependent upon indulging the court—did so and partially switched their position, urging us to decide whether section 92 exists. But in answer to our question "whether this court should decide the validity of 12 U.S.C. § 92 in the absence of a challenge to its validity," appellants could only suggest that the question might be jurisdictional—that if section 92 actually had been repealed in 1918, the case might be "moot" or perhaps might "not even arise." I do not think there is very much to either argument [1] (nor, apparently,

[1] Although the repeal of a statute moots controversies over the law's validity, *see, e.g., Burke v. Barnes*, 479 U.S. 361, 363-64, 107 S.Ct. 734, 736-37, 93 L.Ed.2d 732 (1987), here the parties *agree* that section 92 is valid, and they have a continuing controversy over the Comptroller's authority to permit national banks to sell

does the majority), but I agree with appellants' implicit premise: that unless we determine the validity question to be jurisdictional, we should not decide it.

My colleagues take a different position. Driven by the perceived duty to inquire, on their own, into section 92's validity, they decide the issue. With all due respect, I think the majority is quite wrong in its perception of our judicial obligation. We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us. It is quite fair to say that we have added it to the case; we have created a controversy that did not exist. That 1 U.S.C. § 204(a) states that "matter set forth" in the Code "establish[es] prima facie the laws of the United States" hardly suggests any independent duty on the part of the judiciary to inquire whether matters not appearing in the Code, but which the parties agree continue to be law, remain valid.[2]

I do not think my view has ever been stated better than in the passage the majority quotes from *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir.1983), written by then-Judge Scalia:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of

insurance nationwide. And the case obviously arises under federal law for purposes of 28 U.S.C. § 1331, because, *inter alia*, the parties have stated a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 2866 n. 4, 92 L.Ed.2d 166 (1986); *Robbins v. Reagan*, 780 F.2d 37, 42 (D.C. Cir. 1985) (per curiam).

[2] I do not think the majority is even correct in using the term "presumption," but our "duty" is not affected in any event.

legal questions presented and argued by the parties before them.

Id. at 177. The majority, however, trumps Judge Scalia in *Carducci* with Justice Scalia in *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990). There the Supreme Court decided that a statute, whose exact application was in dispute, did not even apply to a particular transaction, *see id.* 111 S.Ct. at 418, 422, notwithstanding that no party had even suggested such an argument in the Supreme Court or the court of appeals. Justice Scalia, writing for the Court, did not, however, make clear that the statutory construction adopted by the Court was not argued by the parties at any stage (Justice Stevens pointed it out in his concurring opinion, *see id.* 111 S.Ct. at 422-23). So, importantly, the Court never explained or justified what it did. I do not think that under these circumstances the Court meant to establish a precedent on the point.[3] As in the area of standing, I think we should follow only what the Court says it does, not merely what it does. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119, 104 S.Ct. 900, 918, 79 L.Ed.2d 67 (1984) (court addressing a jurisdictional issue is not bound by prior decisions that passed on the question *sub silentio*); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 800 (D.C.Cir.1987) (prior decision that reached merits without discussing standing did not constitute precedent on standing).

The next year in *Kamen v. Kemper, Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), the Court, relying on *Ohio Power*, said that

[3] Perhaps because the Court did not wish to set forth a justifying principle that extended beyond that case. The Supreme Court, I gather, weighs docket management factors that the lower federal courts do not encounter. If the Court wants us to adopt a more relaxed stance than I think appropriate, this case may well offer a suitable vehicle to so instruct us.

"[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* 111 S.Ct. at 1718. Of course, that statement in a sense begs the question, because the hard analysis comes in determining when an issue or claim is properly before the court. In *Kamen*, the petitioner had brought a shareholder derivative action under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64, without making a demand for relief upon the board of directors, effectively asserting her right to do so under federal common law. She did not advert to state law until her reply brief in the court of appeals, and thus that court, in shaping a federal common law rule, refused to consider state law. The Supreme Court reversed, holding that the court of appeals could and should look to state law to fashion the contours of the federal law that governed. *See Kamen*, 111 S.Ct. at 1718. In other words, the petitioner in *Kamen* did assert a right not to make a demand under federal law, and the case was decided on that basis; the Supreme Court only thought that the court of appeals should have looked to state law for guidance. That does not seem to me much different than a court relying on a case not cited by the parties to support a contested proposition. And the Court continued: "We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived. . . ." *Id.* 11 S.Ct. at 1718 n. 5. This is that very case where the unasserted claim (that Congress repealed section 92 and therefore the Comptroller's actions under it were unlawful) was waived; it was, in fact, carefully deliberately, and thoughtfully waived.

The majority's reliance on *Town of South Ottawa v. Perkins*, 94 U.S. 260, 24 L.Ed. 154 (1876), is equally misplaced, because the issue of the statute's validity in that case was raised by the litigants. *See id.* 94 U.S. at

262, 266. Similarly, although the "stipulation of law" cases also cited by the majority establish courts' power to reach nonjurisdictional issues not raised by the parties, they do not suggest that it is always appropriate for courts to do so.

More in point, it seems to me, is *McCormick v. United States*, —— U.S. ——, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). In that case the Supreme Court refused to consider an appellant's argument, made for the first time in his brief to that Court, that Congress did not intend the anti-extortion Hobbs Act, 18 U.S.C. § 1951, to apply to campaign contributions. Because he concluded that the statute did not apply, Justice Scalia in a concurring opinion said, "I think it well to bear in mind that the statute may not exist." *Id.* at 1820. But he made quite clear that he would not decide the case on that ground. *See id.* The approach taken in *McCormick* accords with other decisions in which courts have declined to consider nonjudisdictional issues not raised by the parties. *See, e.g., Spaulding v. University of Washington*, 740 F.2d 686, 694 n. 2 (9th Cir.) (declining to decide, in a pre-*Garcia* case involving a charge of discrimination under the Equal Pay Act, 29 U.S.C. § 206(d)(1), whether the Act might be unenforceable against the university, a conceded state agency, "[b]ecause the parties neither raise the issue nor contend that it affects our jurisdiction"), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984).

As acknowledged by the *McCormick* majority, *see McCormick*, 111 S.Ct. at 1814 n. 6, some courts recognize an exception to the general principle of judicial restraint that I assert. The "plain error" doctrine is occasionally applied in the civil as well as the criminal context to decide issues not raised by the parties where manifest injustice might otherwise result. *See, e.g., Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469 n. 1 (D.C. Cir.1987) (discussing civil cases invoking the plain error

rule in exceptional circumstances where error is obvious and grave); *see also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) (appellate court is justified in resolving issue not raised below if "the proper resolution is beyond any doubt" or "'injustice might otherwise result'" (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941))). But I think that avenue is hardly open to us here, since—as appellants pointed out in their post-argument brief—for over seventy years the Comptroller, Congress, federal courts, and even the Supreme Court, *see Bank*, 405 U.S. 394, 400 n. 12, 92 S.Ct. 1085, 1090 n. 12, 31 L.Ed.2d 318 (1972), have assumed that the statute remains in effect.[4] (It actually appears in the United States Code Service. *See* 12 U.S.C.S. § 92.) Injustice is more likely to result from our reaching the issue than from our declining to do so, because the question of section 92's validity affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence and who, having no notice that the question might be decided, had no opportunity to make their views known in this case. I would therefore affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

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[4] *See* Maj.Op. at 737-39. Although I agree that subsequent assumptions by the executive, legislative, and judicial branches cannot establish Congress' intent in 1918, I do think that such widespread acceptance of section 92's existence precludes us from reaching a different conclusion in the absence of a challenge by one of the parties.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

---

and Consolidated Case No. 90-5214

[Filed May 22, 1992]

On Appellees' Petitions for Rehearing

BEFORE: SILBERMAN, BUCKLEY and HENDERSON, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing of appellees, it is

Ordered, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRÉ
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Silberman would grant the petition for rehearing of the United States National Bank of Oregon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

No. 90-5214

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Appellants

v.

ROBERT L. CLARKE, *et al.*

[Filed May 22, 1992]

On Appellees' Suggestions for Rehearing *En Banc*

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges.*

ORDER

Appellees' Suggestions for Rehearing *En Banc* have been circulated to the full Court. The taking of a vote was requested and responses were received. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
For the Court
CONSTANCE L. DUPRÉ
Clerk

Circuit Judges SILBERMAN, WILLIAMS, and D.H. GINSBURG would grant the suggestion of appellee United States National Bank of Oregon, limited to Point II thereof.

Separate statement filed by *Circuit Judge* SENTELLE concurring in the denial of rehearing *en banc*, with whom *Circuit Judges* BUCKLEY and HENDERSON join.

Separate statement filed by *Circuit Judge* SILBERMAN, dissenting from the denial of rehearing *en banc*, with whom *Circuit Judges* WILLIAMS and D.H. GINSBURG join.

Separate statement filed by *Circuit Judge* RANDOLPH.

SENTELLE, *Circuit Judge*, concurring in the denial of rehearing *en banc*, with whom *Circuit Judges* BUCKLEY and HENDERSON join: I write separately expressing concurrence in the Court's denial of rehearing *en banc* to respond briefly to a theory advanced by our dissenting colleagues.

Our colleagues question the "judicial power" of a federal court to decide an issue of law concededly dispositive of the case where parties have not raised the issue. I think it most apparent that federal courts *do* possess this power. The alternative is that the parties could force a federal court to render an advisory opinion. What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, *sua sponte*, raised the question of the repeal of section 92.

It has long been recognized that we are "free to ignore" stipulations as to matters of law, *NLRB, Local 6 v. FLRA*, 842 F.2d 483, 485 n.6 (D.C. Cir. 1988); *see also Barry v. United States*, 865 F.2d 1317, 1326 (D.C. Cir. 1989) ("A concession by a party as to a matter of law, unlike a stipulation of fact, need not hinder a court from finding the proper legal view.") (Sentelle, J., dissenting on other grounds). Thus, by declining to argue that Congress repealed the section, appellants cannot stipulate into existence a repealed statute and then compel the Court to compliantly advise the parties what it would do if that statute existed. "[I]t is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.'" *Flast v. Cohen*, 397 U.S. 83, 96 (1968) (quoting C. WRIGHT, FEDERAL COURTS 34 (1963)).

The soundness of this rule is suggested by the following: If the parties can by stipulation bring into existence section 92 and have us decide whether the Comptroller properly exercised his authority under the statute, what is to prevent the parties from next asking us whether the delegation of that authority to the Comptroller was constitutional?

That parties have assumed and the Comptroller has enforced the repealed statute for over seventy years seems to me irrelevant to the question. The question is not how long the parties assumed a certain state of the law, but whether that state of the law is merely an assumption. The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. U.S. CONST. art. I, § 1 and § 7, cl. 2 & 3; *INS v. Chadha*, 462 U.S. 919, 946 (1983). No stipulation by an executive official purporting to operate under a statute and a party affected by the official's actions can bring that statute into existence, even for purposes of a judicial decision as to its construction.

I agree with the dissent that there are obvious limits on the power of the Court—I disagree with the dissent as to what those limits are. I am convinced that it is within the Court's power to determine the existence of a statute essential to the determination of a case or controversy whether or not the parties assume or stipulate that the statute does or does not exist. At bottom, I do not think it within the power of the Court to render an advisory opinion on the construction of a statute whose existence depends on the failure of the parties to assert its invalidity.

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*, with whom *Circuit Judges* WILLIAMS and D.H. GINSBURG join: We think this case should be reheard *en banc*, but the rehearing should be confined to an issue raised only by appellee United States National Bank of Oregon: did the court properly reach and decide the question whether the statutory provision on which the Comptroller based his regulation, and which has been enforced for over 70 years, was repealed by Congress in 1918? As the dissenting opinion points out, the appellant trade associations, whcih represent insurance agents and underwriters, deliberately refused to argue (waived) any claim that Congress did repeal section 92. Even when the panel ordered supplementary briefing directed to that issue five months after argument, the appellants declined to argue that Congress repealed the section. Since the question is not jurisdictional, we do not see how it can be appropriate for a federal court, *sua sponte*, to decide it, and we fear that the implications of what might be thought a rather expansive view of federal judicial power could be profound indeed.

Almost any case brought rests on certain uncontested legal assumptions that may be thought to be logical antecedents to the issues in dispute. A court is not free, however, to examine itself any of those legal assumptions (if non-jurisdictional) just by asserting that they are "essential to the determination." Concurrence at 2. That would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy. A majority of this court rejected that concept in a statement of Judge Bork joined by Judges Ginsburg, Scalia, Starr, Silberman, and Buckley concurring in the denial of rehearing *en banc* in *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1986). The United States, concerned that a panel of this court had accepted and ratified what the United States thought might be an improper expansion of Title VII (to cover a claim for relief "for sex-based discrimination" by a woman who alleged that she was denied a promotion in

favor of another woman who had a sexual relationship with their supervisor, *id.*), wished time to consider whether to file an *amicus* brief supporting rehearing. We denied rehearing because the District of Columbia, the defendant, had not challenged the plaintiff's expansive view of Title VII but rather, assuming coverage, argued that its conduct did not violate the statute. Judge Bork said:

> Rehearing of that issue *en banc* would be inappropriate because no party challenged that application of Title VII on appeal and the issue was not briefed or argued to the panel. . . . Because the point was *not* before the panel on appeal there is no occasion to address the issue *en banc*.

Id. (emphasis in original). In other words, the statement treated the panel's approval of that interpretation, although phrased as a holding, as limited only to that case and therefore not binding precedent. The *en banc* majority thought that even if it disagreed with what the concurrence terms the parties' "stipulation of law," it would be inappropriate to so hold because the issue was not contested in the case.

With all due respect to our concurring colleagues, we think they have the advisory opinion point exactly backwards. An advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933). When a court issues an opinion on an uncontested, non-jurisdictional matter of law like the one here, it has made "an abstract determination . . . of the validity of a statute" and issued an advisory opinion—although to the world rather than the parties—because the issue was not part of the case or controversy.[1]

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[1] It seems to us that the phrase "stipulates to a matter of law" is too general to be useful in consideration of this kind of problem. We would agree, for instance, that if both parties simply misread a Supreme Court decision in their briefs we would not be bound to that interpretation. But that is far removed from a party's failure to bring an analytically separate claim that we thought was available. We are not free to add such a claim to a case.

The government makes a forceful argument that the panel, having reached the question whether section 92 was repealed in 1918, decided the matter incorrectly. Given the importance of this issue to the banking and insurance businesses throughout the country, we would ordinarily be inclined to view the government's petition sympathetically. We do not so regard the government's petition here, because, having vigorously argued before the panel that the court should not reach the "repeal" question, the government now quietly drops that argument and urges us to do that which it originally contended was improper—reach the repeal issue but decide it, instead, in the government's favor.

We full well recognize that the panel's opinion *itself* created legal uncertainty concerning the sale of insurance by banks located and doing business in small towns (which has been the settled practice for most of this century), and, therefore, it would be only natural for the Comptroller to wish a speedy *judicial* action to dispel this uncertainty. But we are frankly disappointed that the government as a whole would not have thought the question of judicial power—surely, in the long run—to be more important.

In any event, the Supreme Court may well be in a better position to deal with both issues. Now that the insurance industry, disinclined to look a gift horse in the mouth, is willing to support the panel's opinion and argue that Congress did repeal section 92, the Supreme Court could grant *certiorari* on that issue and, in light of its supervisory role over federal courts, will give guidance on the question that we think even more significant.

RANDOLPH, *Circuit Judge*: It has become customary for members of this court to issue statements concurring in or dissenting from denials of rehearing *en banc*. I doubt the propriety of this practice. Such statements are rarely confined to setting forth the author's reasons for thinking or not thinking the case important enough to warrant *en banc* treatment. Although the statements may take this form, more often than not they contain expressions of a different sort. Judges commonly use denials of rehearing *en banc* to declare their views on the merits of the case. Those who were not on the original panel announce what they would have decided if only they had been called upon to rule. Judges who were members of the panel express afterthoughts, or respond to criticism contained in the *en banc* statements of other judges, or explain what the panel "really" meant. All of this may be good for the soul. But it rubs against the grain of Article III's ban on advisory opinions. The manner in which these *en banc* "bulletins" are formulated does not simulate the process of the court when it is actually deciding a case. If recurring issues are addressed, *en banc* statements may be tantamount to prejudgments. Another common practice on denials of rehearing *en banc* is, to my mind, also inappropriate. It occurs when the judge steps out of the robe and into the role of an advocate, urging the Supreme Court to take the case on certiorari and correct the panel's judgment.

Many years ago two wise judges found it a "dubious policy" if "any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter . . . especially since, if the issue is of real importance, further opportunities for expression will assuredly occur," *United States v. New York, New Haven & Hartford R.R.*, 276 F.2d 525, 553 (2d Cir.) (statement of Friendly, J., joined by Lumbard, C.J.), *cert. denied*, 362 U.S. 961 & 964 (1960).

I fully agree with Judge Friendly and Judge Lumbard. In my view, denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 86-3042, 86-3045

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Plaintiffs,

v.

ROBERT L. CLARKE, *et al.*,
Defendants

and

UNITED STATES NATIONAL BANK OF OREGON,
Defendant-Intervenor.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Plaintiffs,

v.

ROBERT L. CLARKE, *et al.*,
Defendants

and

UNITED STATES NATIONAL BANK OF OREGON,
Defendant-Intervenor.

[Filed May 8, 1990]

OPINION

JOHN H. PRATT, *District Judge.*

I. *Introduction*

The above action is only the latest chapter in the long running battle for turf on the part of two powerful industries, each of which is subject to governmental regulation. In this case, the insurance industry seeks protection from incursions into its claimed territory by the commercial banking industry. On behalf of life, health, property, and casualty insurance agents throughout the United States, various trade associations brought this consolidated action for declaratory and injunctive relief against the Office of the Comptroller of the Currency ("OCC"), the Comptroller himself, and the United States.[1] After the complaints were filed, the United States Bank of Oregon ("USBO"), a national bank chartered under the National Bank Act, 12 U.S.C. §§ 21-216d (1988) (sometimes "NBA"), intervened as an additional defendant.

At issue is whether the Comptroller reasonably concluded that section 92 of the NBA, *id.* § 92,[2] authorized

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[1] We hereby grant defendants' unopposed request that the complaint, which alleges nothing against the United States *eo nomine*, be summarily dismissed against that party.

[2] It is worth noting that this section no longer appears in the United States Code. Enacted by Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (1916), it apparently was inadvertently repealed in 1918. *See* Act of Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512 (1918). However, since Congress, other courts, and the Comptroller have presumed its continuing validity, *see, e.g., Commissioner v. First Sec. Bank*, 405 U.S. 394, 401 & n. 12, 92 S.Ct. 1085, 1090 & n. 12, 31 L.Ed.2d 318 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 n. 6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1013 (5th Cir. 1968); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1511 (1982) [hereinafter Garn-St. Germain Act] (purporting to amend § 92); 12 C.F.R. § 7.7100 (1989), we will assume that the statute exists *in proprio vigore*.

USBO, through a subsidiary bank insurance agency, to solicit and sell insurance to customers located throughout the country. Plaintiffs contend that the Comptroller's decision permits USBO and its parent, U.S. Bancorp, a bank holding company registered under the Bank Holding Company Act of 1956, *id.* §§ 1841-1849 (1988) (sometimes "BHCA"), to violate alleged geographic restrictions on insurance activities contained in both the NBA and the BHCA.[3] *Id.* §§ 92, 1843(c)(8). There being no dispute as to any material fact, defendants and USBO moved for summary judgment or dismissal, and plaintiffs crossmoved for summary judgment. The issues have been fully briefed by the parties and the amici curiae.[4]

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[3] Defendants claim that two plaintiffs, the National Association of Life Underwriters ("NALU") and the Oregon Life Underwriters Association ("OLUA"), lack standing because they represent insurance underwriters rather than agents. From plaintiffs' uncontested response, however, it is clear that NALU and OLUA represent insurance agents, not underwriters. As such, they plainly have standing to proceed. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) ("[C]ompetitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the the Comptroller's rulings.").

[4] Plaintiffs have requested leave to file two supplemental exhibits. Proposed Exhibit 16, the text of a June 10, 1987, address by Richard V. Fitzgerald, Chief Counsel of the Comptroller, is a *post hoc* commentary on the mental processes that led to the Comptroller's decision, and thus is not relevant to this case. *See Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam) (focal point for judicial review of Comptroller's decision should be administrative record already in existence, not some new record); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) (judicial review of agency action normally confined to full administrative record before agency at time decision was made). Accordingly, leave to file this exhibit is denied. Leave is granted with respect to proposed Exhibit 17, a re-typed version of a previously filed letter from defendants' counsel.

II. *Background*

A. USBO's "New Activities" Proposal

As a national bank, USBO is subject to the regulatory jurisdiction of the Comptroller, the principal expositor of the NBA. *See Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759-60, 93 L.Ed.2d 757 (1987) (citations omitted); *First National Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir.1980); 12 U.S.C. §§ 1-216d; 12 C.F.R. §§ 1.1, 4.1a-4.11 (1989). Under OCC regulations, a national bank wishing to perform "new activities" through a subsidiary must submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. 5.34(d)(1)(i). Upon receiving such a proposal, the Comptroller evaluates whether the activities would "exceed those legally permissible for a national bank operating subsidiary." *Id.* § 5.34(d)(1)(ii). If the Comptroller requires more than thirty days for this evaluation, he may extend the review period, in which case the bank must await "written notification" before engaging in the "new activities." *Id.*

U.S. Bancorp, USBO's parent, is regulated by the Federal Reserve Board (sometimes the "Board"), which administers the BHCA.[5] *See Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, 85 S.Ct. 551, 556-57, 13 L.Ed.2d 386 (1965); *Northeast Bancorp, Inc. v. Board of Governors*, 849 F.2d 1499, 1501 (D.C.Cir.1988); 12 U.S.C. §§ 1841-1849; 12 C.F.R. § 225.1. U.S. Bancorp did not submit an application to the Board concerning the proposed "new activities" of USBO. Consequently, the Board was never requested to nor did it approve U.S. Bancorp's indirect involvement in certain insurance activities.

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[5] Although plaintiffs allege violations of the Bank Holding Company Act, neither U.S. Bancorp nor the Federal Reserve Board is a party to this action.

Pursuant to OCC regulations, USBO, whose principal office is in Portland, Oregon, submitted a "new activities" proposal to the OCC's Western District on October 16, 1984. USBO sought to offer, through its subsidiary U.S. Bank Insurance Agency, Inc. ("Bank Agency") "a full range of insurance products" from a branch office of USBO in the small town of Banks, Oregon.[6] Letter from T. Dalrymple to Billy C. Wood (Oct. 16, 1984). USBO relied on section 92 of the NBA and a December 1, 1983, opinion letter [7] to conduct the proposed activities. *See id.*

The primary question raised by the proposal was whether any geographic restrictions applied to the solicitation or sale of insurance authorized by section 92 of the NBA. That section provides that any national bank:

> located and doing business *in any place the population of which does not exceed five thousand inhabitants,* as shown by the last preceding decennial census, *may, under such rules and regulations as may be prescribed by the Comptroller . . ., act as the agent for any fire, life, or other insurance company authorized* . . . to do business in [the state in which the bank is located], *by soliciting and selling insurance and collecting premiums on policies issued by such company. . . .*

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[6] The 1980 census population of Banks was 489.

[7] In 1983, USBO contacted the Assistant Commissioner of the Oregon Department of Commerce concerning the possibility of USBO's acting as an insurance agent through branches in small Oregon communities. The Commissioner requested an opinion from the OCC as to the types of activities authorized by 12 U.S.C. § 92. Letter from Robert E. Miller to Joe Pogar, Regional Counsel (Oct. 7, 1983). The OCC's resultant opinion letter stated, in pertinent part: "[A] national bank or its office may act as an insurance agent without geographic restriction to the community [in which] it is located. However, whether a national bank or its office may act as an insurance agent on an interstate basis is an unsettled issue." Letter from Debra A. Chong, Senior Attorney, Western District, to Robert E. Miller at 1 (Dec. 1, 1983) [hereinafter Chong Letter].

12 U.S.C. § 92 (emphasis added).[8] A similar provision applies to bank holding companies. *See id.* § 1843(c)(8)(C). Section 4(c)(8) of the BHCA prohibits a bank holding company from engaging in, or acquiring and retaining "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." *Id.* § 1843(c)(8); *see Independent Insurance Agents of America, Inc. v. Board of Governors,* 835 F.2d 1452, 1454 (D.C.Cir.1987). Subject to a few limited exceptions, the BHCA precludes the Board from finding that the provision of "insurance as a principal, agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" with "a population not exceeding five thousand (as shown by the last preceding decennial census)." *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents,* 835 F.2d at 1455 nn. 4-5. This provision was added to the BHCA in 1982 [9] and was "intended to conform to" Board regulations that already permitted such activity,[10] "as well as the authority in" section 92 of the

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[8] As originally enacted in 1916, § 92 also authorized such national banks to act as brokers or agents "in making or procuring loans on real estate located within one hundred miles of the" community. 39 Stat. 753 (1916). This provision was deleted in 1982, Garn-St. Germain Act, *supra* note 2, 96 Stat. 1511, because Congress considered it "obsolete and unjustifiably restrictive." H.R. Conf. Rep. No. 899, 97th Cong., 2d Sess. 89 (1982); *accord* S. Rep. No. 536, 97th Cong., 2d Sess. 27 (1982) [hereinafter Senate Report], U.S. Code Cong. & Admin. News 1982, 3054, 3081.

[9] Garn-St. Germain Act, *supra* note 2, 96 Stat. 1536-37.

[10] Beginning in 1971, the Board determined that certain types of insurance activities were "so closely related to banking" that bank holding companies could engage in them under the BHCA. "One of these was the sale of any insurance in a community that had a population not exceeding 5,000." *Independent Ins. Agents,* 835 F.2d at 1454. In 1979, the Board began to limit this exemption to bank holding companies that (1) had their principal place of business in a small town; and 2) operated another subsidiary serving the public

NBA. Senate Report, *supra* note 8, at 38, U.S.Code Cong. & Admin.News 1982, p. 3092.

Since 1963, over twenty-five years ago, the Comptroller has applied section 92 to any branch office "located in a community of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100 (first codified in 1971).[11] Similarly,

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in the small town in which they wished to sell insurance. *See id.* In 1986, after passage of the Garn-St. Germain Act, the Board deleted the principal place of business requirement from its new regulations, having determined that it was not mandated by either the text or the purpose of § 4(c)(8). 12 C.F.R. § 225.25(b)(8)(iii) (1989); *see Independent Ins. Agents*, 835 F.2d at 1455. The D.C. Circuit recently upheld the Board's decision against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57.

[11] After 23 years of silence, plaintiffs now assert that this interpretive ruling is invalid. They claim that Congress could not have intended to authorize insurance activities outside a bank's "headquarted location" because in 1916, when § 92 was enacted, branch banking did not exist. Plaintiffs emphasize that the MacFadden Act, 12 U.S.C. §§ 36, 81, which authorizes national banks to conduct business through branch offices, was not passed until 1927.

This challenge, even if meritorious, is barred by laches. *Independent Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C.Cir.1980). Plaintiff's are trade associations "charged by [their] members with anticipating the impact of government rulings" concerning insurance activities banks. *Id.* at 488. As such, their long delay in challenging this ruling is patently unreasonable. *See id.* (12 years held unreasonable). Further, since 1963, some national banks have invested substantial capital in insurance agency branches "that meet the ruling's requirements." *Id.; see, e.g.*, Letter from Michael J. O'Keefe, District Counsel, Midwestern District (June 19, 1986), Ex. 4 to Pls.Mem. [hereinafter O'Keefe Letter]; Letter from David H. Baris, Regional Counsel (Dec. 29, 1978), Ex. 2 to Pls. Mem. [hereinafter Baris Letter]. Equity will not protect those who "through years of silence ha[ve] created an impression of acquiescence that has led others to make substantial financial commitments." *Independent Bankers v. Heimann*, 627 F.2d at 488.

We also note that plaintiffs' challenge is based on a false premise. Contrary to their assertion, branch banking was not unknown in

a Board regulation allows a subsidiary of a bank holding company to engage "in any insurance agency activity in a place" the population of which does not exceed 5,000, provided the subsidiary "has a lending office" there. *Id.* § 225.25(a), (b)(8)(iii).[12] It is the Board's policy, however, that solicitation and sales must be restricted to that place "and to other areas of less than 5,000 adjacent to" it. 51 Fed. Reg. 36,201, 36,206 (Oct. 19, 1986); *see also First United Bancshares, Inc.*, 73 Fed.Res. Bull. 162 (1987).

B. The Comptroller's Approval Letter

The Comptroller notified USBO that review of its proposal would extend beyond thirty days, and that USBO could not conduct the proposed insurance activities unless the Comptroller communicated in writing that he had no objection. Letter from Rufus O. Burns, Jr., District Administrator, Western District, to T. Dalrymple (Oct. 24, 1984). Almost two years later, on August 18, 1986, the Comptroller approved USBO's proposal and, in so doing, authorized Bank Agency, the subsidiary of USBO, "to sell insurance to customers residing outside" Banks, Oregon. *See* Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to T. Dalrymple at 4 (Aug. 18, 1986) [hereinafter "Approval Letter" or "Letter"].

1916. At the turn of the century, five national banks and 82 state banks operated a total of 119 branches. *First Nat'l Bank v. Walker Bank & Trust*, 385 U.S. 252, 257, 87 S.Ct. 492, 495, 17 L.Ed.2d 343 (1966) (citation omitted). By the end of 1923, several years prior to the enactment of the McFadden Act, 91 national banks and 580 state banks operated a total of 2,054 branches. *Id.* (citation omitted).

[12] The D.C. Circuit recently upheld this regulation against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57. *See supra* note 10.

The Approval Letter analyzed the text and legislative history of section 92, as well as relevant OCC rules and policies. Section 92, it found, was silent concerning the sale of insurance "to persons and businesses located in different states." *Id.* at 2-3. The Letter then explained that the original statute had included an express geographic restriction (100 miles) applicable to loans on real estate.[13] According to the Letter, this restriction, coupled with the absence of one on insurance activities indicated "congressional intent not to limit geographically a bank's market area for its insurance products." *Id.* at 3 (relying on *expressio unius est exclusio alterius*).

The Approval Letter next explained that section 92's legislative history—essentially only a 1916 letter from Comptroller Williams to the Senate Banking and Currency Committee—did "not directly address [the] geographic limitation" at issue. *Id.* Williams drafted and recommended the passage of what ultimately became section 92's insurance provision. *See id.; see also* 53 Cong. Rec. 11001 (1916).[14] Based on his comments, the Approval Letter concluded that the primary purpose of the insurance provision was to provide additional sources of revenue to national banks that, due to their location in small towns, "were having problems deriving a reasonable profit from their banking business." Approval Letter at 4 (citations omitted).

Allowing sales to customers outside the local population would further this purpose, the Letter reasoned, because the local population's demand for insurance might be too small "to improve significantly the bank's profitability . . . ." *Id.* In this regard, the Letter emphasized that the

[13] *See supra* note 8.

[14] Williams recommended that insurance privileges be granted to national banks located and doing business in communities of 3,000 or fewer inhabitants. *See* 53 Cong.Rec. 11001. Prior to passage, Congress changed the operative figure to 5,000. *See id.* at 11153.

Comptroller had never imposed any geographic restrictions on the insurance activities of small town national banks, and that no relevant restrictions existed under Oregon law. *Id.* The Letter did not address the proposals' legality under the BHCA.

Based on this analysis, the Approval Letter authorized Bank Agency to "sell insurance . . . to existing and potential customers regardless of where [they] are located." *Id.* at 5. The only qualification was that Bank Agency "could not sell insurance . . . to customers located in a state where the" underwriter was not licensed to do business. *Id.* Subsequently, Bank Agency began offering insurance to customers in a number of states. The Federal Reserve Board has never taken any action regarding U.S. Bancorp's indirect involvement in these activities.[15]

Plaintiffs assert that the Approval Letter, by authorizing geographically unlimited sales of insurance, sanctions violations of section 92 of the NBA and section 4(c)(8) of the BHCA.[16] They seek to enjoin the Comptroller to withdraw the Approval Letter and to refrain from granting similar approval to any other national bank. While plaintiffs concede that we lack jurisdiction to adjudicate their BHCA claim,[17] they urge us to find that the Comptroller erroneously approved USBO's proposal without providing the Board an opportunity to consider its legal-

[15] The Board clearly has the power to act. *See* 12 U.S.C. § 1844(b), (c), (e).

[16] Originally, plaintiffs' wide ranging complaint also alleged that the Approval Letter violated the McFadden Act's restrictions on "branch banking," 12 U.S.C. §§ 36, 81. Plaintiffs dropped this claim after USBO affirmed that Bank Agency was the only branch engaged in the insurance activities at issue. *See* Pls.Mem. at 9 n. 6.

[17] Pls.Reply Mem. at 18-19. The Board has exclusive jurisdiction in the first instance to determine the merits of a BHCA challenge, 12 U.S.C. § 1842, with judicial review only in a court of appeals, *id.* § 1848. *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 288 (D.C.Cir. 1988) (citing *Whitney Nat'l Bank*, 379 U.S. at 419-23, 85 S.Ct. at 556-59).

ity under the BHCA. We turn first to plaintiffs' claim under the NBA.

III. *Plaintiffs' Claim Under the National Banking Act*

A. The Applicable Standard of Review

It is undisputed that the Approval Letter of August 18, 1986, is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988). *See Camp v. Pitts*, 411 U.S. 138, 140, 93 S.Ct. 1241, 1243, 36 L.Ed.2d 106 (1973) (per curiam); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-58 90 S.Ct. 827, 827, 831, 25 L.Ed.2d 184 (1970). However, since no hearing or formal findings were required for the Comptroller to pass on USBO's proposal, his decision can be overturned only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Camp v. Pitts*, 411 U.S. at 140-42, 93 S.Ct. at 1243-44 (citing 5 U.S.C. § 706(2)(A)); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-17, 91 S.Ct. 814, 822-24, 28 L.Ed.2d 136 (1971). Moreover, because we are called upon to review an agency's interpretation of its governing statute,[18] we are required to apply the landmark test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Sullivan v. Everhart*, —— U.S. ——, 110 S.Ct. 960, 964, 108 L.Ed.2d 72 (1990).

Under *Chevron*, our first inquiry is whether Congress has directly addressed the issue of geographic restrictions on insurance sales under section 92. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the

[18] *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citation omitted).

agency, must give effect to the unambiguously expressed intent of Congress." *Id.* 467 U.S. at 842-43, 104 S.Ct. at 2781. However, "if the statute is silent or ambiguous with respect to [this] issue," we must determine whether the Comptroller's construction is "permissible," *id.* 467 U.S. at 843, 104 S.Ct. at 2781, that is, whether it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123, 108 S.Ct. 413, 420-21, 98 L.Ed.2d 429 (1987). In so doing, we must give "great weight" to any reasonable interpretation the Comptroller has adopted. *Clarke v. Securities Industry Association*, 479 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citiation omitted); *see Securities Industry Association v. Board of Governors*, 821 F.2d 810, 813 (D.C.Cir.1987) (citations omitted), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988).

B. Chevron Step One

Plaintiffs contend that the Comptroller's interpretation contradicts the plain meaning of the statute. According to plaintiffs, section 92 clearly limits insurance sales and solicitation to the small community in which the bank's selling office is located, in this case Banks, Oregon. This of course misstates the facts. We agree with the Comptroller that the statute is silent on this issue.

As in all cases of statutory interpretation, we begin by examining the statutory language itself. *Investment Co. Inst. v. Conover*, 790 F.2d 925, 933 (D.C.Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 93 L.Ed.2d 372 (1986); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (citation omitted). Section 92 plainly permits Bank Agency, under such regulations as the Comptroller may prescribe, to solicit and sell insurance for any insurance company authorized to do business in Oregon. *See* 12 U.S.C. § 92.

Beyond this, the statute says little. It does not refer to the market Bank Agency may serve, much less restrict solicitation or sales to the residents of Banks. *See id.* This silence, coupled with the express delegation of rule-making authority to the Comptroller, suggests that Congress explicitly "left a gap for the [Comptroller] to fill." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Plaintiffs argue, however, that a geographic restriction is implicit in the statute's requirement that the selling office be "located and doing business" in a small community. 12 U.S.C. § 92. Plaintiffs stretch the text too far. The phrase "located and doing business" plainly refers to the location of Bank Agency, not the customers to whom it may sell. Certainly USBO may accept deposits or extend credit to customers located outside Banks. Nowhere else does the NBA prohibit a national bank from offering its services to customers residing outside the community in which it is located. Indeed, an "affirmative indication" is required "to justify [a statutory] interpretation that would permit a national bank to engage in a business but" prevent the bank from advertising it. *Franklin National Bank v. New York*, 347 U.S. 373, 377-78, 74 S.Ct. 550, 553, 98 L.Ed. 767 (1954). Therefore, if Congress had intended to impose such a prohibition here, it presumably would have done so expressly.

Plaintiffs also attempt to read a geographic restriction into section 92's provision that underwriters whose policies a national bank sells be authorized to do business in the state in which the bank's selling office is located. 12 U.S.C. § 92. Again plaintiffs stretch the text too far. We agree with defendants that this provision "does not even hint at any restriction on the location of customers, much less any requirement that . . . customers reside only in the small community in which the [selling] office is located." USBO's Reply Mem. at 8. Rather, it seems merely to reflect Congress' recognition that insurance is essentially a state-regulated industry. *See* Dfs. Reply Mem. at 7-8.

At the risk of laboring the obvious, our first injury under *Chevron* does not end with the statutory language itself. It is helpful to examine "the language and design of the statute as a whole" for signs of congressional intent on the issue at hand. *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. at 1817 (citation omitted). We are not unmindful of the fact that, as originally enacted, section 92 also authorized small town national banks to engage in mortgage activities. 39 Stat. 753 (1916).[19] Significantly Congress expressly restricted the scope of these activities. A small town national bank could procure "loans on real estate located within one hundred miles of the" bank's office. *Id.* This provision indicates that Congress knew how to impose geographic restrictions when it wanted to. It deliberately chose not to with respect to insurance activities.[20]

Turning next to the legislative history, we agree with the Comptroller that this history does not directly address the issue. The only substantive comments regarding section 92's insurance provision are contained in a letter to the Senate Banking and Currency Committee from Comptroller Williams, who drafted the provision and recommended its adoption by Congress. *See* 53 Cong.Rec.

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[19] *See supra* note 8.

[20] Under the maxim *expressio unius est exclusio alterius*, if " 'Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposedly in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). While this maxim is subordinate " 'to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose,' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23, 103 S.Ct. 683, 690, 74 L.Ed.2d 548 (1983) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943)), there is no conflict between the two in this case. As discussed immediately *infra*, the primary purpose of the legislation does not require the imposition of geographic restrictions on insurance sales and solicitation.

11001 (1916). Wiliams was concerned with the competitive problems faced by many small national banks and their negative consequences for customers. While small national banks endowed with "average deposits" and "good management" could lend money at legal interest rates and still return a profit, "many banks," due to "small deposits," were unable to accomplish this task. *Id.* As a result, these bank often charged "excessive and in some cases grossly usurious" interest rates. *Id.* Williams believed the bank needed "additional sources of revenue" in order to compete more effectively "with local State banks and trust companies which are sometimes authorized . . . to do a class of business not strictly that of commercial banking." *Id.* Accordingly, he recommended that national banks "located in villages and towns" with populations not in excess of 3,000 [21] "be permitted to acts as agents for insurance companies . . . and for the negotiation of loans on . . . real estate. . . ." [22] *Id.*

Plaintiffs, recognizing Williams' concern with small, struggling banks, question its applicability to USBO, the forty-fourth largest bank in the country. Clearly, however, the statute makes no distinction between profitable and unprofitable banks. *Cf. United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 2081, 60 L.Ed.2d 624 (1979) ("The short answer is that Congress did not write the statute that way."). Moreover, there is no indication that Williams *intended* to create such a distinction. Although he recognized that some small town banks were profitable, *see* 53 Cong.Rec. 11001, he recommended a provision that on its fact applies to *all* small town banks, regardless of

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[21] Congress changed the operative number to 5,000. *See* 53 Cong. Rec. 11153.

[22] Williams believed that the real estate should be located in the bank's region of the country, where the bank might "have some direct knowledge as to [its] value. . . ." 53 Cong. Rec. 11001. He recommended no similar limitation on insurance activities.

size or capitalization level. *See* 12 U.S.C. § 92. Finally, since 1963 the Comptroller has extended insurance privileges to branch offices, such as Bank Agency, that meet the statute's locational requirement. 12 C.F.R. § 7.7100. As we stated earlier, this interpretive ruling is no longer subject to challenge.[23] In light of these factors, we find plaintiffs' contention completely without merit.

Williams also expressed his views on why his proposal should be limited "to banks in small communities." 53 Cong.Rec. 11001. While "the new business" would help small town banks to become profitable, he doubted it would "assume such proportions as to distract [bank] officers . . . from the principal business of banking." *Id.* For city banks, however, he thought the banking business already "afford[ed] ample scope for the energies of trained and expert bankers." *Id.* Williams also predicted that "in many small places" the market for insurance or mortgages would not "take up the entire time of an insurance broker," and that small town banks therefore would be unlikely "to trespass upon outside business naturally belonging to others." *Id.* Apparently, Williams assumed that a low demand for insurance in many small towns would deter insurance agents from soliciting there.

Plaintiffs argue that Williams' second rationale mandates a narrow construction of section 92. It envinces, they claim, a legislative intent to prohibit banks from marketing insurance outside the small towns in which they are located. Again we disagree. Williams' statement bears the indicia of a prediction, not a prerequisite. *See id.* ("the bank is not . . . *likely* to trespass") (emphasis added). As such, it is an insufficient basis for reading a geographic restriction into an otherwise silent statute. Moreover, we are not convinced that Williams would have written the statute any differently had he foreseen the societal changes that have rendered his pre-

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[23] *See supra* note 11.

diction anachronistic.[24] As stated earlier, his primary goal was to provide small town banks with additional sources of revenue, not to protect the markets of competing insurance agents. *See id.* In the absence of a clearer indication of legislative intent, we are not free "to redraft" the statute "in an effort to achieve that which" plaintiffs believe Congress "ha[s] failed to do." *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1792-93, 85 L.Ed.2d 64 (1985).

C. Chevron Step Two

Because we hold that section 92 is silent with respect to geographic limitations on sales and solicitation, we must defer to any reasonable interpretation by the Comptroller on that issue. *See Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781; *Clinchfield Coal Co. v. Federal Mine Safety & Health Commission*, 895 F.2d 773 at 779-80 (D.C.Cir. 1990); *Securities Industry Association v. Board of Governors*, 821 F.2d at 813; *Investment Co. Institute v. FDIC*, 815 F.2d 1540, 1546 (D.C. Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987). As our analysis under the first prong of *Chevron* indicates, "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history" or the statute's purpose "casts doubt on [his] interpretation." *Northeast Bancorp*, 849 F.2d at 1503. According to plaintiffs, however, there are at least three reasons why the Approval Letter deserves no deference. First, they claim, it contravenes the general policy reflected in the country's banking laws of separating banking from commerce. Second, they argue that section 92 and the BHCA's "small town" insurance activities provision should be considered together, and that the latter clearly restricts the geographic scope of solicitation and sales. Third, plaintiffs contend that the Comptroller's decision is inconsistent with prior agency rulings on the same issue.

[24] We take judicial notice of the fact that this country is more densely populated and technologically advanced now than it was in 1916.

1. *The Policy of Separating Banking From Commerce*

Plaintiffs maintain that the banking laws of this country reflect a clear congressional policy to separate banking from commerce. In the present case, however, neither the fact of the statute nor the legislative history contradicts the Comptroller. Therefore, even assuming *arguendo* that plaintiffs statement of general policy is correct,[25] their argument must fail. *See Investment Co. Institute v. FDIC*, 815 F.2d at 1549 (citing *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82). "It is not our place to implement congressional policy in ways Congress itself fails to pursue." *Id.* (citing *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74, 106 S.Ct. 681, 688-89, 88 L.Ed.2d 691 (1986); *TVA v. Hill*, 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2301-02, 57 L.Ed.2d 117 (1978)); *see also Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793.

2. *The Effect of Section 4(c)(8)(C) of the Bank Holding Company Act*

Plaintiffs next argue that section 4(c)(8)(C) of the Bank Holding Company Act and section 92 of the National Bank Act are *in pari materia*—that is, pertain to the same subject—and thus should be construed together. They maintain that section 4(c)(8)(C), the similar "small town" exception applicable to bank holding companies, "unequivocally limits the geographic scope" of insurance activities to the small community in which the bank is located. Pls. Reply Mem. at 6. Plaintiffs assert that "[t]his parallel provision," which was passed in 1982, "sweeps away any ambiguity in the legislative history of section 92 itself." *Id.* at 5. In short, they ask us to find

[25] It is worth noting that § 92 is not the only "exception" to this "policy." For example, Congress has authorized national banks to deal in securities of certain governmental entities and to offer investments in the form of commingled investment retirement accounts. Glass-Steagall Act, § 16, 12 U.S.C. § 24 (Seventh); *see Investment Co. Inst. v. Conover*, 790 F.2d 925.

that section 92 is governed by the same geographic limitations they claim are mandated by section 4(c)(8)(C) of the BHCA. For the reasons that follow, we reject their interpretation.

Clearly, the language of the two provisions is not identical. Whereas section 4(c)(8)(C) authorizes "any insurance agency activity in a place" whose population does not exceed 5,000, 12 U.S.C. § 1843(c)(8)(C), section 92 empowers a national bank "located and doing business in" such a place to act as a general insurance agent. *Id.* § 92. As a general rule, "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute," and "[t]he use of the specific in the [former] cannot fairly be read as imposing a limitation upon the general provision in the [latter]." *Russello v. United States*, 464 U.S. 16, 25, 104 S.Ct. 296, 301, 78 L.Ed.2d 17 (1983). Therefore, even if section 4(c)(8)(C) plainly restricted solicitation and sales to a place whose population does not exceed 5,000,[26] there ordinarily would be no justification for reading that restriction into the less specific terms of section 92.

The canon of *in pari materia* is a rather narrow exception to the general rule that different statutes should be read differently. In this case, the canon simply does not apply. The two provisions were enacted over sixty-five years apart and deal with two different types of

[26] We question whether the geographic scope of the BHCA's "small town" exception is "unequivocally limit[ed]." Pls.Reply Mem. at 6. Although § 4(c)(8)(C) was "intended to conform to" existing Board regulations, Senate Report, *supra* note 8, at 38, U.S. Code Cong. & Admin. News 1982, p. 3092, one of which limited "solicitation or sales . . . to the small town and to other areas of less than 5,000 adjacent to" it, 51 Fed. Reg. at 36,206; *see First United Bancshares*, 73 Fed. Res. Bull. 162, the Board has subsequently departed from at least one of these regulations. *See Independent Ins. Agents*, 835 F.2d 1452 (agreeing with Board that statute did not compel principal place of business requirement); 12 C.F.R. § 225.25(b)(8)(iii); *see also supra* notes 10 & 12 and text accompanying note 12.

banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies. *See Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972) (rule's application makes the most sense when the statutes are on the same subject and were enacted by the same Congress at the same time). In addition, the statutes were not "intended to serve the same function." *Id.* 409 U.S. at 245, 93 S.Ct. at 481. The BHCA provision is concerned with activities that are "so closely related to banking . . . as to be a proper incident thereto," 12 U.S.C. § 1843(c)(8), whereas section 92 was designed to help small town banks increase their earnings by providing them with another source of revenue. *See* 53 Cong.Rec. 11001.

Section 4(c)(8) prohibits a bank holding company from engaging in, or owning "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8); *see Independent Insurance Agents*, 835 F.2d at 1454. With a few exceptions, the statute precludes the Board from finding that the sale of "insurance as a principal, agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" whose population does not exceed 5,000. *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents*, 835 F.2d at 1455 nn. 4-5.

Section 92 addresses a completely unrelated concern: the need to provide small town national banks with additional sources of revenues. The authority it confers is in no way tied to whether the insurance activity is "closely related to banking." *See* 12 U.S.C. § 92. In fact, section 92 is a specific exception to the general rule that national banks are limited to "such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24 (Seventh).

Although the BHCA provision was "intended to conform to," *inter alia*, "the authority in" section 92, Senate

Report, *supra* note 8, at 38, U.S.Code Cong. & Admin. News 1982, p. 3092, this alone is an insufficient reason to hold that the two sections are *in pari materia*. In light of the countervailing considerations discussed above, we are confident that the sections need not be construed together.

Plaintiffs next posit that, in passing the BHCA provision, Congress assumed that section 92 imposed geographic restrictions on sales and solicitation. Congress' understanding is clear, plaintiffs theorize, from the fact that section 4(c)(8)(C) "unequivocally limits the geographic scope" of insurance activities, Pls. Reply Mem. at 6, and was "intended to conform to . . . the authority in" section 92, Senate Report, *supra* note 8, at 38, U.S. Code Cong. & Admin.News 1982, p. 3092. This postulate, even if true, would not alter the reasonableness of the Comptroller's interpretation.

Our review in this case centers on congressional intent in 1916, when section 92 was enacted. Since nothing in the BHCA itself sheds light on that intent, plaintiffs cannot rely on the maxim, announced in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969), that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 116-18 & n. 13, 100 S.Ct. 2051, 2060-61 & n. 13, 64 L.Ed.2d 766 (1980). The maxim does not apply to "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant. . . ." *Id.* 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13; *see United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968) (one Congress' views as to construction of statute adopted many years earlier by another Congress have minimal or no significance) (citations omitted). Indeed, "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history *prior* to its enactment." *GTE Sylvania*, 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13 (emphasis added); *cf., e.g., United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted). In this case, where "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history" or the statute's purpose "casts doubt on [his] interpretation," *Northeast Bancorp*, 849 F.2d at 1503, we see no reason to depart from this principle.

At this juncture, it is worth underscoring that Congress has charged separate agencies with administering the BHCA and the NBA. As USBO points out, nothing in the BHCA or its legislative history suggests that the Comptroller of the Currency must cede his interpretive authority over section 92 in favor of accepting any interpretation of section 4(c)(8)(C) that the Federal Reserve Board may choose to adopt. USBO's Reply Mem. at 30-31. If Congress wishes to avoid inconsistent interpretations of the two provisions, Congress alone has the power to act. In the meantime, the agencies are free to implement any reasonable policy where Congress has left a gap. *See Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793. The Comptroller has done just that. The fact that his conclusion may be at odds with the Board's is not our concern.

3. *Prior Comptroller Interpretations*

Where an agency's interpretation of a statutory provision " 'is inconsistent with its prior analysis in similar situations without any acknowledgement of the fact, or cogent explanation as to why,' the 'result reached by the agency is impermissible under the second prong of *Chevron.*' " *General Motors Corp. v. National Highway Traffic Safety Administration*, 898 F.2d 165 at 174 (D.C.Cir. 1990) (quoting *King Broadcasting Co. v. FCC*, 860 F.2d

465, 470 (D.C.Cir.1988)). Plaintiffs assert that the Approval Letter is inconsistent with earlier positions taken by the Comptroller regarding geographic restrictions under section 92. We conclude, however, that prior to the Approval Letter, the Comptroller had never undertaken a comprehensive analysis of or implemented a restrictive policy on this issue. *Compare National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C.Cir.1985) ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Moreover, even if the Approval Letter represented a departure from prior policy, the Comptroller certainly provided a "cogent explanation as to why." *King Broadcasting*, 860 F.2d at 470. Therefore, plaintiffs' argument must fail.

Plaintiffs rely on statements in a few opinion letters, but these do not support their assertion. First, each statement constituted informal advice or opinion, not a definitive announcement of policy. *Compare National Black Media Coalition*, 775 F.2d at 355 ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Second, none of the statements establishes the position plaintiffs urge—that section 92 restricts insurance sales and solicitation to residents of the community in which the bank's selling office is located.[27]

[27] The Comptroller's views on the geographic area a bank insurance agency may serve were first requested in mid-1970. *Letter* Letter from Robert Bloom, Chief Counsel, at 1 (July 17, 1970), Ex. 1 to Pls.Mem. [hereinafter Bloom Letter]. At that time, "[t]he only generalization" the Comptroller could "safely" make was that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." *Id.* at 2. While plaintiffs rely heavily on this statement, they ignore that the very next year the Comptroller did not object to a bank's using an official at its main office to solicit business for its branch insurance agency. *See* Letter from Thomas G. DeSnazo, Deputy Comptroller (June 9, 1971). They also overlook a 1978 "no objection" letter issued to a bank that proposed to sell insurance from its small town agency to customers of other branches located in larger towns. Baris Letter, *supra* note 11. As these and other letters demonstrate, the Comptroller has never limited insurance sales to the community in which the selling office is located.

Plaintiffs maintain, however, that the Bloom Letter announced at least *some* geographic restriction, and that the Approval Letter unjustifiably disregarded this policy. We reject this assertion for three independent reasons. First, we doubt that the Bloom Letter ever constituted a definitive policy statement. *See* O'Keefe Letter, *supra* note 11, at 2; Chong Letter, *supra* note 7, at 1. Second, even if it did, the Approval Letter did not necessarily depart from it. The Bloom Letter simply opined that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." Bloom Letter at 2. As we stated earlier, a national bank is free to offer its services to customers residing outside the community in which it is located. *See Franklin Nat'l Bank*, 347 U.S. at 377-78, 74 S.Ct. at 553. Therefore, with today's advanced mail and wire services and expansive advertising capabilities, the service area for a bank's customary business is potentially world-wide. Plaintiffs have not alleged that USBO's banking activity is limited to Banks, Oregon, or that it does not extend to the states in which Bank Agency currently offers insurance. Third, the Comptroller certainly has offered a "cogent explanation as to why" he believes that no geographic restrictions apply. *King Broadcasting*, 860 F.2d at 470. The Approval Letter was over twice as long as the Bloom Letter, and engaged in a much more in-depth analysis of the language and purpose of § 92. Therefore, the Comptroller's decision, even if inconsistent with past policy, was completely justified. *See General Motors*, 898 F.2d at 174 (citing *King Broadcasting*, 860 F.2d at 470).

Based on the foregoing analysis, we hold that the Comptroller's interpretation, being "rational and consistent with the statute," must be upheld. *NLRB v. United Food & Comercial Workers*, 484 U.S. at 123, 108 S.Ct. at 420-21; *see Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82. We turn now to plaintiffs' claim under the BHCA.

IV. *Plaintiffs' Claim Under the Bank Holding Company Act*

As independent issue from the reasonableness of the Comptroller's construction of section 92 is whether the

BHCA bars U.S. Bancorp, USBO's parent, from "launching nationwide insurance activities" through Bank Agency, USBO's subsidiary. Pls. Reply Mem. at 18. While plaintiffs concede that we lack jurisdiction to decide the merits of this question,[28] they contend that the Comptroller erred by issuing the Approval Letter without providing the Board "an opportunity to consider the legality of the proposed transaction." *Id.* at 19. Citing Supreme Court dictum that "exceptional circumstances . . . may stay the hand of the Comptroller," *Whitney National Bank*, 379 U.S. at 426 n. 7, 85 S.Ct. at 560 n. 7, plaintiffs argue that an injunction would be appropriate in this case. They rely on *Independent Bankers Association of America v. Conover*, 603 F.Supp. 948, 958 (D.D.C.1985), in which the district court held that it was authorized to determine whether the Comptroller's action raised "substantial" questions under the BHCA and whether an injunction should issue to allow the Board to resolve those questions.

Courts have been reluctant to find the existence of "exceptional circumstances" that would warrant such an injunction. *See, e.g., American Insurance Association v. Clarke*, 865 F.2d 278, 288 (D.C.Cir.1988). This reluctance is especially justified when an injunction would halt the operations of an ongoing business such as Bank Agency. *Cf. Marshall & Ilsley Corp. v. Heimann*, 652 F.2d 685, 701 n. 27 (7th Cir.1981) (where ultimate relief requested was not a mere stay of Comptroller's proposed action, as in *Whitney*, but divestiture of assets acquired almost four years earlier, stay pending Board review would be inappropriate), *cert. denied*, 455 U.S. 981, 102 S.Ct. 1489, 71 L.Ed.2d 691 (1982). Moreover, we take "notice of the obvious fact that the Board has not taken advantage of its ample opportunity to act on" USBO's proposal.[29] *Independent Bankers v. Conover*, 603 F.Supp. at 958 n. 17. "Although the *Whitney* test is not time-bound, it appears that the original concern was that the Board had 'not had an *opportunity* to determine' the issue presented." *Id.* (quoting *Whitney*, 379 U.S. at 425, 85 S.Ct. at 560) (emphasis in *Independent Bankers v. Conover*). In *Independent Bankers v. Conover*, the Board had taken no action for over one and a half years. *Id.* In the present case, almost four years have elapsed since the Comptroller issued the Approval Letter. During that time, the Board has taken no steps toward resolving the allegedly "substantial" BHCA issue arising therefrom. We are satisfied that under these circumstances there is no compelling need for an injunction.

[28] Pls.Reply Mem. at 18-19; *see supra* note 17.

[29] The Board clearly has the power to act. *See* 12 U.S.C. § 1844 (b), (c), (e).

V. *Conclusion*

Based on the foregoing analysis, we hold:

(1) that section 92 of the NBA is silent on the issue of geographic restrictions on the solicitation and sale of insurance;

(2) that the Comptroller reasonably and permissibly interpreted section 92 as authorizing Bank Agency, a subsidiary of USBO, to offer insurance to customers residing outside Banks, Oregon, regardless of the geographic location of said customers;

(3) that there are no "exceptional circumstances" in this case warranting a stay of the Comptroller's decision pending Federal Reserve Board review of the legality of USBO's proposal under the BHCA; and

(4) plaintiffs' claims for relief should be addressed to Congress; this Court is the wrong forum.

An order consistent with this Opinion has been entered this day.

ORDER

Upon consideration of the motions of defendants and defendant-intervenor for dismissal or summary judgment and plaintiffs' cross-motion for summary judgment, the oppositions thereto, the briefs of amici curiae, and the entire record here, and for the reasons stated in an accompanying Opinion entered this day, it is by the Court this 8th day of May, 1990,

ORDERED that summary judgment is entered in favor of defendants and defendant-intervenor on all counts; it is

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is

FURTHER ORDERED that this case is dismissed with prejudice.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752:

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act" approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

At the end of section eleven insert a new clause as follows:

"(m) Upon the affirmative vote of not less than five of its members the Federal Reserve Board shall have power, from time to time, by general ruling, covering all districts alike, to permit member banks to carry in the Federal reserve banks of their respective districts any portion of their reserves now required by section nineteen of this Act to be held in their own vaults."

That section thirteen be, and is hereby, amended to read as follows:

[1] "Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Fed-

eral reserve banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

[2] "Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturiy at the time of discount of not more than ninety days, exclusive of days of grace: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

[3] "The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

[4] "Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

[5] "Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus.

[6] "Any Federal reserve bank may make advances to its member banks on their promissory notes for a

period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

[7] Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

[8] "The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

[9] "That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as an agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Provided, however*, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

[10] "Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States or the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular posses-

sions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: *Provided, however*, That no member bank shall accept such drafts or bills of exchange referred to this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security: *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

That subsection (e) of section fourteen, be, and is hereby, amended to read as follows:

"(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell, with or without its indorsement, through such correspondents or agencies bills of exchange arising out of actual commercial transactions which have not more than ninety days to run, exclusive of days of grace, and which bear the signature of two or more responsible parties, and, with the consent of the Federal Reserve Board, to open and maintain banking accounts for such foreign correspondents or agencies."

That the second paragraph of section sixteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances rediscounted under the provisions of section thirteen of this Act, or bills of exchange indorsed by a member bank of any Federal reserve district and purchased under the provisions of section fourteen of this Act, or bankers' acceptances purchased under the provisions of said section fourteen. The Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it."

That section twenty-four be, and is hereby, amended to read as follows:

"SEC. 24. Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty

per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receieve time deposits and to pay interest on the same.

"The Federal Reserve Board shall have the power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section."

That section twenty-five be, and is hereby, amended to read as follows:

"SEC. 25. Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

"First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

"Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in

foreign countries, or in such dependencies or insular possessions.

"Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described under subparagraph two of the first paragraph of this section shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

"Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to restrict its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being complied with,

said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the said Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

"Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

"Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'"

Approved, September 7, 1916.

Section 5202 of the Revised Statutes:

No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913):

CHAP. 6.—An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "Federal Reserve Act."

POWERS OF FEDERAL RESERVE BANKS.

SEC. 13. Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money,

national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

Upon the endorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a majority at the time of discount of not more than ninety days: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512:

CHAP. 45.—An Act To provide further for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."